No. 92-969

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IN THE

Supreme Court of the United States

October Term, 1992

JOSEPH P. NAPOLI,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the phrase contained in 18 U.S.C. § 1962(c), which makes it "unlawful for any person employed by or associated with any enterprise *** to conduct or participate, directly or indirectly, in the conduct of [the] enterprise's affairs through a pattern of racketeering activity", require proof that the defendant control the management or operation of the enterprise?

2. Whether due process requires a hearing on Petitioner's post-verdict motions alleging that he was denied a fair trial because, in apparent disregard of the court's instructions, jurors read and discussed wide-spread news accounts concerning Petitioner's trial counsel's representation of notorious organized crime figures in a criminal case pending in the same district court Petitioner was tried in; and that Petitioner's trial counsel's

simultaneous representation of those organized crime figures and him created a conflict in representation thereby prejudicing his right to effective assistance of counsel.

3. Whether the Second Circuit Court of Appeals and other Circuit Courts of Appeals have misapplied the decision of this court in United States v. Nardello, 393 U.S. 286 (1969), and in so doing misconstrued the provision of RICO requiring state predicates to be "chargeable under state law" (18 U.S.C. § 1961[1][A]).

4. Whether the exclusion of perjury from the definition of Racketeering Activity set-forth in 18 U.S.C. § 1961(1)(A) permits the use of a violation of the federal mail fraud statute as a predicate act for what was a state court perjury.

5. Whether the RICO statute is unconstitutionally vague both on its face and as applied.

LIST OF PARTIES

Apart from Petitioner Joseph P. Napoli, the other parties to the appeal in the United States Court of Appeals for the Second Circuit, whose judgment is sought to be reviewed, were Morris J. Eisen, Harold M. Fishman, Dennis Rella, Marty Gabe, Geraldine G. Morganti, and Alan Weinstein, appellants, and the Respondent, United States of America.

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No.

In The

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October Term, 1992

JOSEPH P. NAPOLI,

Petitioner,

- against -

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Joseph P. Napoli, pro se, respectfully prays that a Writ of Certiorari be issued to review the Order of the United States Court of Appeals for the Second Circuit, entered on August 17, 1992, which affirmed the judgment of the United States District Court, Eastern District of

New York (Sifton, J.), entered on September 4, 1991.

OPINION BELOW

The opinion of the Court of Appeals is reported at 974 F.2d 246 and appears in the Appendix as 1a-45a. The Court of Appeals, in its August 17th Order, affirmed the judgment of the United States District Court, Eastern District of New York, convicting Petitioner, after a jury trial, of violating the anti-racketeering statute (18 U.S.C. §1962[c]), and conspiring to violate that statute (18 U.S.C. §1962[d]), and sentencing him, pursuant to the Federal Sentencing Guidelines, to a term of imprisonment of forty-six months.

The Order of the Court of Appeals, dated October 20, 1992, denying the petition for rehearing and noting that no judges of the court requested a vote on the suggestion for rehearing in banc appears in the Appendix as 46a.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254. The Order of the Court of Appeals sought to be reviewed was filed on August 17, 1992. The Petition for rehearing, with a suggestion for rehearing in banc, was denied by Order of the Court of Appeals, dated October 20, 1992. This Petition for a Writ of Certiorari is filed within the time prescribed by U. S. Sup. Ct. Rule 13, 28 U.S.C.A.

CONSTITUTIONAL PROVISION INVOLVED

Fifth Amendment:

> "No person shall *** be deprived of life, liberty, or property, without due process of law."

STATUTES INVOLVED

18 U.S.C. §1962. Racketeer Influenced and Corrupt Organizations Act. Prohibited Activities.

> "(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of an unlawful debt.
>
> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section."

STATEMENT OF THE CASE

Petitioner and six others were accused by a Grand Jury, sitting in the Eastern District of New York, of violating the federal anti-racketeering statute (18 U.S.C. §1962 [c]), and conspiring to violate the anti-racketeering statute (18 U.S.C. 1962 [d]), alleging in the twenty-six acts of racketeering the commission of mail fraud (18 U.S.C. §1341) and bribery (N.Y. Penal Law §§ 200.00 and 215.00) in connection with the representation of plaintiffs in personal injury actions by persons employed by or affiliated with the Morris J. Eisen, P.C., law firm. Specifically, Petitioner was named in seven racketeering acts.[1]

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[1] Also named as co-defendants/co-conspirator in the indictment were attorneys Morris J. Eisen, and Harold Fishman; investigators Alan Weinstein, Dennis Rella, and Martin Gabe; and the Eisen firm office administrator, Geraldine Morganti. Petitioner was "of (continued...)

The government's case against Petitioner, and his six co-defendant, rested primarily on the testimony of numerous witnesses who had negotiated generous cooperation agreements with the United States Attorney's Office, as well as with local (county) prosecutors, in return for their immunized testimony. Particularly important to the government's case was the testimony of Steven DiJoseph, the managing attorney at Eisen firm from February 1983, until October 18, 1984 (T864-72, 1075-80, 5389). As a key government witness, DiJoseph testified about many of the racketeering acts set forth in the indictment, admitting that he

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[1](...continued)
counsel" to the Eisen firm.

The six co-defendants were also convicted after trial, and their convictions were affirmed by the Second Circuit. Co-defendants Morris J. Eisen, Geraldine G. Morganti, and Dennis Rella have filed their Petitions for a Writ of Certiorari.

was the architect of many of the frauds charged, that he committed crimes too numerous to catalogue, and that he violated his oath as attorney on a daily basis.[2] Indeed, during his testimony, DiJoseph volunteered that he "[h]ad no ethics" while he was managing attorney at the Eisen firm (T1282), and what he hated two of the Eisen defendants he was testifying against,

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[2] In its opinion, per curiam, accepting Steven DiJoseph's resignation from the New York Bar, the Appellate Division of the Supreme Court of New York, First Department, said that, "In November, 1990, while under no indictment, [DiJoseph] voluntarily testified in Federal Court under a grant of immunity at the racketeering and conspiracy trial of Morris Eisen, Esq., and other members of his firm. During the course of that trial [DiJoseph] admitted to misconduct involving fabrication of evidence, forgery and perjury in a significant number of judicial proceedings. [DiJoseph] acknowledges that if charges were predicated upon the foregoing misconduct under investigation, he could not successfully defend himself on the merits against such charges" (Matter of DiJoseph, 174 A.D.2d 78, 79, 578 N.Y.S.2d 832 [1992]).

namely: Petitioner and Geraldine Morganti (T1528).

The evidence presented at trial established, inter alia, that, while co-defendant Morris J. Eisen "was the founder, sole shareholder, and principal attorney of the Eisen firm [, Petitioner] was associated with the Eisen firm in an 'of counsel' capacity, and he was the main trial attorney for the firm" (3a). According to the testimony of government witnesses DiJoseph and William Stanton (another former Eisen firm employee) the structure of the firm was such that, as a personal injury lawsuit was being investigated and prepared for trial, the case moved through different layers of attorneys and investigators until it was ready for trial, at which time the case, depending on a number of factors, was assigned to a particular trial attorney, Petitioner being one of them.

No evidence was presented that Petitioner was involved in preparing for trial any of the cases referred to in the indictment, that he was even consulted about them or, for that matter, that he had anything to do with them before the cases were ready for, and then assigned to Petitioner, for trial which, on occasion, happened days before a jury was to be selected. Moreover, no evidence was presented that, as "the main trial attorney", Petitioner had any administrative or managerial responsibility or authority in the Eisen firm, other than responsibility for the functioning of his office. Indeed, Petitioner was not a salaried employee of Morris J. Eisen, P.C., having negotiated an agreement whereby he was to receive a percentage of the fees paid to the firm in cases he successfully tried or settled as plaintiff's counsel.

Jury deliberations lasted some three weeks (A5), during which time argument was heard on an application made by the same United States Attorney's Office to another United States district judge, seeking the disqualification of Petitioner's trial counsel (Gerald L. Shargell) in the (unrelated) notorious case of United States v. Gotti, 771 F.Supp. 552 (E.D.N.Y. 1991) (Glasser, D. J.). Because the government repeated (in open court) allegations it made against Mr. Shargell in its sealed papers, Petitioner moved to sequester the jury to insulate them from the expected widespread attention given to the Gotti case, the disqualification motion, and the unflattering revelations about the Gotti defense team, which included Mr. Shargell as one of the key members of the team. Sequestration was denied and the court, inter alia, instructed the jury to avoid listening to or reading the news over the

weekend and provided a means by which the jurors could call the court to learn about developments in the war against Iraq. The jurors informed the court that they could comply with the request.

Post-verdict, an investigator for the Eisen defense team spoke to one of the jurors who, without hesitation, informed the investigator that he learned about and discussed with other jurors the publicity surrounding the Gotti case, including the information widely disseminated about Mr. Shargell, in apparent disregard of the court's instructions.

Application was made for a hearing to determine the prejudicial effect the publicity had on the jury's deliberations. The court invited counsel to submit questions to be asked of the jurors at a hearing. Ultimately the court declined to conduct the hearing.

Post-sentencing, Petitioner moved, pursuant to 28 U.S.C. §2255, for an order vacating his conviction on the ground that he was denied effective assistance of counsel, in that a conflict of interest arose from trial counsel's representation and subsequent disqualification in the Gotti case. The court denied the petition without a hearing.

On appeal to the United States Court of Appeals for the Second Circuit, Petitioner argued, inter alia, that the government failed to prove that his "conduct" related to the enterprise or furthered the enterprise in that he did not guide, manage, direct, or otherwise exercise control over the course of the enterprise's activities; that under New York law, he could not have been convicted of bribing a witness (N.Y. Penal Law § 215.00); and that at the very least he should been afforded hearings on his juror

misconduct and ineffective assistance of counsel claims.

On August 17, 1992, the Court of Appeals affirmed Petitioner's conviction. Petitioner thereafter sought reargument, with a suggestion for rehearing in banc, raising again these issues, among others. By order dated October 20, 1992, the Court of Appeals denied the petition for rehearing and noted that no judge requested a vote on the suggestion for rehearing in banc (46a).

By Order dated November 5, 1992, Petitioner's application to be continued on bail to obtain a writ of certiorari from the Supreme Court was granted.

REASONS FOR GRANTING THE WRIT

I.

THERE EXISTS A CONFLICT IN THE CIRCUITS CONCERNING THE MEANING OF THE LANGUAGE IN 18 U.S.C. §1962(C), "TO CONDUCT OR PARTICIPATE DIRECTLY OR INDIRECTLY, IN THE CONDUCT OF THE ENTERPRISE'S AFFAIRS".

18 U.S.C. §1962(c) provides that,

> "[i]t shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of any unlawful debt" (emphasis added).

The meaning and scope of the underscored language has led to a conflict in the circuits and inconsistent results. In Yellow Bus Lines, Inc. v. Drivers, Chauffeurs, & Helpers Local Union 639, 913 F.2d 948, 952-3 (D.C. Cir. 1990), the court, criticizing the Second Circuit's decision in United States v. Scotto, 641 F.2d 47, 54 (2d Cir. 1980), cert. denied,

452 U.S. 961 (1981), which was adopted by the Ninth Circuit in United States v. Yarbough, 852 F.2d 1522, 1544 (9th Cir.), cert. denied, 488 U.S. 866 (1988), said that,

> "[s]imply put, our task is to determine the intent of Congress in using the phrase 'to conduct or participate, directly, or indirectly, in the conduct of [the] enterprise's affairs,' 18 U.S.C. §1962(c). *** The numerous courts that have construed the participation requirements of §1962(c) have followed divergent paths and have reach disparate conclusions.
>
> The Second Circuit-at least in dicta- has announced the broadest interpretation of the 'participation in the conduct' language. That circuit stated that,
>
> > [o]ne conducts the activities of an enterprise through a pattern of racketeering when (1) one is enabled to commit the predicate offense solely by virtue of [one's] position in the enterprise or involvement in or control over the affairs of the enterprise, or (2) the predicate offenses are related to the activities of that enterprise.
>
> * * *
>
> We do not necessarily dispute the Second Circuit's views about what section 1962(c) does not require. However, the Scotto Court was far too lenient in its test for what section 1962(c) does require. If section 1962

(c) can apply whenever predicate offenses are merely related to the activities of an enterprise, then the 'participation in the conduct' element of that section practically drops out. Any pattern of predicate acts remotely related to an 'enterprise', whether committed by a mail clerk in the target enterprise or by the C.E.O. of the enterprise's business competitor, might give rise to RICO liability under the Second Circuit's Scotto test.

Recognizing the overbreadth of the Second Circuit's language in Scotto, the Fifth Circuit modified the Scotto standard to establish a more restrictive test. Citation omitted. The court explained that '[t]he mere fact that a defendant works for a legitimate enterprise and commits racketeering acts while on the business premises does not establish that the affairs of the enterprise have been conducted 'through' a pattern of racketeering activity.' Citation omitted.

* * *

The Eighth Circuit, en banc, articulated probably the most restrictive view of the scope of the 'participation in the conduct' requirement. Offering a district court guidance for evaluating a plaintiff's complaint on remand, that circuit wrote:

> Mere participation in the predicate offenses listed in RICO, even in conjunction with a RICO enterprise, may be insufficient to support RICO cause of action. A defendant's participation must be in the

> conduct of the affairs of RICO enterprise, which ordinarily will require some participation in the operation or management of the enterprise itself" (emphasis in original).

After reviewing the salient opinions in this area of law, the court in Yellow Bus Lines concluded that,

> "Congress, we stress, did not proscribe mere participation in the enterprise's affairs through a pattern of racketeering activity, but rather, subjected participation in the conduct of an enterprise's affairs to RICO liability.
>
> 'Conduct" is synonymous with 'management or direction' *** The conduct of [the enterprise's] affairs 'thus connotes more than just some relationship to the enterprise's activity; the phrase refers to the guidance, management, direction or other exercise of control over the course of the enterprise's activities. In order to participate in the conduct of an enterprise's affairs, then, a person must participate, to some extent, in running the show.'" (913 F.2d, at p954).

Recognizing the significance of the inter-circuit conflicts on this issue, and to resolve the conflicts, the Supreme Court accepted for review Reves v. Ernst & Young,

91-886, which was argued on October 13, 1992 (see 61 LW 3203).

Petitioner has argued that as "the main trial attorney" (3a), who was affiliated with Morris J. Eisen, P.C., in an "of counsel" capacity (3a), he did not participate in the conduct of an enterprise's affairs within the meaning of RICO statute, relying on the court's interpretation of 18 U.S.C. §1962(c) in Yellow Bus Lines Inc. supra, 913 F.2d 948. Indeed no evidence was presented at trial that Petitioner guided, managed, directed or exercised any control over the enterprise's activities. Stated another way, no evidence was presented that Petitioner, to any extent, participated in "'running the show'" (913 F.2d at p954). However, the Second Circuit, apparently relying on the more restrictive interpretation set-forth in United States v. Scotto, supra, 641 F.2d at p54, rejected

Petitioner's contention that he did not participate in the conduct of an enterprise's affairs.

Certiorari should be granted to review the important question concerning the proper definition of the phrase "to conduct or participate, directly or indirectly, in the conduct of [the] enterprise's affairs", 18 U.S.C. § 1962(c), and whether Petitioner's conduct falls within that definition.

II.

A SUBSTANTIAL ISSUE AFFECTING THE FAIR ADMINISTRATION OF JUSTICE IS PRESENTED IN THAT PETITIONER WAS DENIED A HEARING ON THE QUESTIONS OF WHETHER HE WAS PREJUDICED BY THE PERVASIVE PUBLICITY SURROUNDING HIS ATTORNEY'S REPRESENTATION OF A NOTORIOUS ORGANIZED CRIME FIGURE AND WHETHER THERE EXISTED A CONFLICT ARISING FROM HIS REPRESENTATION OF THE ORGANIZED CRIME FIGURE THAT PREJUDICED PETITIONER'S RIGHT TO A FAIR TRIAL.

At the Second Circuit, Petitioner contended that his right to due process was violated by the denial of his request for a hearing to determine whether the jurors, in disregard of the district court's admonitions concerning the news, were exposed to and discussed publicity concerning Petitioner's trial counsel (Gerald L. Shargell), who was one of three lawyers representing the defendants in United States v. John Gotti, et al., supra 771 F.Supp 552. In the Gotti case, the government moved to disqualify Mr. Shargell

and others and, while the Eisen jury was deliberating, disclosures adverse to the Gotti lawyers were made during the course of the government's arguments. The court denied Petitioner's motion to sequester the jury and, instead, instructed them that, during the weekend, they should not read the newspaper, listen to the radio or watch the news on television. The court then added that,

> "Well, I will assure you that we are going to give you a couple of phone numbers to call on the events and in the Middle East. I don't have any problems with your calling those numbers. I also have no problem with your asking a member of your family what is the news from the Middle East. That is fine because then you can confine the conversation to the news from the Middle East. But if anybody talks to you about any other events, news events, just tell them, I am sorry, news events from the weekend or after are out and I can't talk about it.*
>
> * * *
>
> Have a very good week-end and maybe I will be hearing from you over the weekend" (T9311).

Post-verdict, a defense investigator interviewed one of the jurors who stated that the jurors had indeed learned about and discussed the publicity concerning Mr. Shargell, and his representation of the Gotti defendants, during their deliberations. The court declined to conduct an evidentiary hearing on the question of what prejudice to Petitioner, if any, resulted from the widespread adverse publicity concerning his counsel which the jurors were exposed to and discussed during their deliberations, notwithstanding the court's instructions to avoid the news coverage.

In Turner v. State of La., 379 U.S. 466, 472-3 (1965), Justice Stewart wrote that,

> "[t]he requirement that a jury's verdict 'must be based upon the evidence developed at the trial' goes to the fundamental integrity of all that is embraced in the constitutional concept of a trial by jury. *** 'The jury is an essential instrumentality -

an appendage - of the court, the body ordained to pass upon guilt or innocence. Exercise of calm and informed judgment by its members is essential to proper enforcement of law.' *** In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed against the defendant come from the witness stand in the courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel."

Later, in Smith v. Phillips, 455 U.S. 209, 217 (1982), then Justice, now Chief Justice Rehnquist wrote that,

"due process does not require a new trial every time a juror has been placed in a potentially compromising situation. Were that the rule, few trials would be constitutionally acceptable. The safeguards of juror impartiality, such as voir dire and protective instructions from the trial judge, are not infallible; it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote. Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen. Such determinations may properly be made at

a hearing like that ordered in Remmer and held in this case ***."

Fundamental to the right to a trial by jury is the presumption that the jury will follow the court's instructions (see United States v. Powell, 469 U.S. 57, 66 [1984]; Opper v. United States, 348 U.S. 84, [1948]). The failure to follow the court's instructions about such subjects as outside influences (news accounts) may result in prejudice to a defendant's right to a fair trial (cf. United States v. Helmsley, 733 F.Supp 600 [S.D.N.Y. 1982]; United States v. Napolitano, 552 F.Supp. 465, 485 [S.D.N.Y. 1982]). At a minimum, having demonstrated the inapplicability of the presumption that a jury will follow a court's instructions, Petitioner was entitled to a hearing on the extent of the prejudice, if any, arising from juror exposure to adverse publicity about his

trial counsel (see United States v. Moten, 582 F.2d 654 [2d Cir. 1978].

Post-judgment Petitioner sought vacatur of his conviction on the ground that, by reason of his attorney's involvement in the Gotti case and his attorney's representation of major organized crime figures connected with that case, counsel's ability to represent him effectively was compromised owing to counsel's conflicts with the same United States Attorney's Office that was prosecuting both the Gotti and Eisen cases. Not only did Petitioner contend that there was a per se conflict, but he identified five areas in which there was actual conflict (35a). Again the court denied Petitioner a hearing to determine the merits of his claim.

Substantial issues concerning the fair administration of criminal justice have been raised (see Rakas v. Illinois, 439

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U.S. 128, 130 [1978], reh. denied 439 U.S. 1122 [1979]), in that Petitioner was denied an opportunity to establish that his due process right to a fair trial was violated.

III.

THE SECOND CIRCUIT COURT OF APPEALS -- AND VARIOUS OTHER COURTS OF APPEALS -- HAVE APPLIED THE RICO STATUTE IN A MANNER WHICH CONFLICTS WITH THE DECISION OF THIS COURT IN UNITED STATES V. NARDELLO. MOREOVER A SPLIT IN THE CIRCUITS EXISTS AS TO WHETHER OR NOT UNITED STATES V NARDELLO PERMITS THE "NON-INCORPORATION" OF THE ELEMENTS OF STATE OFFENSES WHICH SERVE AS PREDICATES FOR FEDERAL PROSECUTIONS UNDER THE TRAVEL ACT AND/OR RICO.

In Point One of his Petition, Petitioner Morris J. Eisen raised the question of "what proof the government must establish in a criminal RICO prosecution which depends, in whole or in part, upon state offenses as predicates for the 'pattern of racketeering activity.' More specifically, when state predicates are utilized to satisfy the element of a pattern of racketeering activity, it presents the issue of whether the government is required, by virtue of the statutory language of RICO *** to prove all

of the underlying elements of such state offense[s] and/or meet any applicable state defenses" (Eisen Pet., pp15-16).

Petitioner adopts the arguments set forth in the Eisen Petition Point One, pp14-45, and adds the following comments.

In the First Racketeering Act, Petitioner was charged under New York State law with bribing a witness (N.Y. Penal Law § 215.00 [Mck. 1988]) "in that he offered to give money to a medical doctor, a witness or one about to be called as a witness in the Ferri case, upon the agreement and understanding that the medical doctor's testimony would thereby be influenced" (Superseding Indictment Cr. No. 90-018 [S-3]).

The witness allegedly bribed by Petitioner testified that, during a dinner meeting with Petitioner and another attorney, it was his "impression", his "interpretation" and his "illusion" that

Petitioner offered him money in return for his favorable medical testimony. In essence the doctor-witness was permitted to testify that it was his understanding that Petitioner was bribing him by offering money in return for testimony.

After the doctor testified to what he thought occurred some eight years earlier, the court admonished the jury concerning the limited value of the doctor's testimony:

> "THE COURT: Incidentally, I've said this earlier, ladies and gentlemen, in reference to something else that raises this kind of issue, that at times witnesses express conclusions about what's going on in front of them and the value of the conclusion, obviously, depends on how accurately it summarizes what the witness could observe, what the witness, in fact based it on. Sometimes these conclusions give the English language appearing to be not only what things are out there objectively to be observed, conversations, things of that sort, but the words suggest what's going on in somebody else's mind.
>
> Now, what's going on in somebody else's mind, as I said before, isn't something that you can physically

observe. Don't take this conclusion as expressing something about what was going on in anybody else's mind in the conversation but simply as expressing what the summary that this witness made of things he saw and heard under the circumstances as this occurred".

New York Penal Law § 215.00 provides in part that,

> "A person is guilty of bribing a witness when he *** offers *** to confer, any benefit upon the witness upon an understanding 'that (a) the testimony of such witness will thereby be influenced ***"

In charging the jury on this crime, the court in relevant part said,

> "And fourth, that the offering or agreeing to confer, or the conferring of the benefit was contingent on an agreement or understanding that the person receiving the benefit, that that person's testimony would be influenced" (T9115).

On appeal Petitioner, inter alia, argued that under New York law, "understanding" referred to the bribe giver's state of mind and not the bribe receiver's state of mind.

Recently, in People v. Bac Tran, __ N.Y.2d__ (Decided Oct. 27, 1992), Slip opn 181, the New York Court of Appeals, construing the analogous New York statute - bribing a public servant (N.Y. Penal Law § 200.00 [Mck. 1988), said that to be guilty of the crime the People must prove beyond a reasonable doubt a "unilateral perception or belief by a perpetrator that the 'public servant's vote, opinion, judgment, action, decision or exercise of discretion as a public servant will thereby be influenced" (Slip Opn 181, at p 10); that unilateral understanding or belief does not "hinge on some mens rea of the bribe receiver'" (Id.), and that a unilateral understanding in the mind of the bribe maker that the bribe will influence the public servant's conduct, or agreement, were not the

functional equivalents, under New York law, of intent (Id., at pp7-8).[3]

The admission of the doctor's testimony concerning his understanding coupled with the court's ambiguous instructions, allowed the jury to find Petitioner guilty of crime not defined by New York law.

Certiorari should be granted to review the important question of whether "chargeable under state law" (18 U.S.C. § 1961 [1][A]) requires the incorporation of the elements of state offenses relied upon by the government to establish a pattern of

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[3] N.Y. Penal Law § 200.00 (Bribery in the third degree) provides that, "A public servant is guilty of bribery in the third degree when he confers, or offers or agrees to confer, any benefit upon a public servant upon an agreement or understanding that such public servant's vote, opinion, judgment, action, decision or exercise of discretion as a public servant will thereby be influenced" (emphasis added).

any relevant state defenses. This is of particular importance to defendants facing RICO charges alleging violations of state law as part of the pattern of racketeering activity because they need to know what elements of each crime are in preparing their defenses. Stated another way, are defendants charged with state crime predicates to defend against some uncertain generic crime or a state crime with particular elements?

IV.

WHETHER THE EXCLUSION OF PERJURY FROM THE DEFINITION OF RACKETEERING ACTIVITY SET FORTH IN 18 U.S.C. § 1961(1)(A) REQUIRES THE VACATUR OF THOSE RACKETEERING ACTS ALLEGING VIOLATIONS OF THE FEDERAL MAIL FRAUD STATUTE (18 U.S.C. § 1341) WHICH WERE BASED UPON SUBORNING PERJURY IN STATE COURT PERSONAL INJURY ACTIONS

At the district court and at the Court of Appeals, the argument was made that, because Congress had intentionally omitted perjury from the definition of racketeering activity set forth in 18 U.S.C. §1961(1)(A), the government's disguising what were essentially perjury racketeering acts as mail fraud predicates required their dismissal.

Though the argument was rejected as being a basis for reversal, the Court of Appeals also recognized "that there is some tension between the congressional decision to include federal mail fraud as a

predicate offense and to exclude perjury, whether in violation of federal or state law" (974 F.2d at p254).

The case at bar best exemplifies this tension because several predicate acts alleged in the indictment were in fact "dressed up" perjury predicates, i.e., the underlying basis of the predicate acts was suborning state court witnesses to commit perjury and the mailing was merely incidental to the action.

As an example, the Fifth Racketeering Act alleged in the Indictment, pertaining to the personal injury action identified as "Willa Robbins and Stewart Robbins v. New York City Transit Authority", was based entirely upon the specific allegation that Petitioner "caus[ed] a witness named Wayne Hollingshead to give false testimony" (Indictment, p13, par 16). What makes this example particularly egregious was, as argued by Petitioner at the Court of

Appeals, that a stipulation was mistakenly entered into by Petitioner's counsel and the government pertaining to if and when the mailing in the Robbins case occurred. That is because the mailing was so attenuated from what the Robbins case was about that it was considered by all to be incidental to the predicate's real focus.

The question presented is substantial as recognized by the Second Circuit and, other than acknowledging that a tension exists between the exclusion of state or federal perjury as predicate acts and the inclusion of federal mail fraud, which may disguise the true content of a (perjury) predicate, there is no authority concerning the use of mail fraud as a predicate act which in essence is a perjury charge.

Certiorari should be granted to review the substanstial federal question of whether by excluding perjury from the definition of Racketeering Activity

contained in 18 U.S.C. § 1961(1)(A), Congress at the same time intended that the federal mail fraud statute could be used as a predicate in a case which has as it's basis perjury and/or subornation of perjury.

V.

IF 18 U.S.C. § 1961(1)(A) DOES NOT REQUIRE THE GOVERNMENT TO PLEAD AND PROVE ALL OF THE ELEMENTS OF STATE OFFENSES RELIED UPON AS RICO PREDICATES -- BUT RATHER REQUIRES ONLY THAT THE CONDUCT ALLEGED "BE TYPICAL OF THE SERIOUS CRIME DEALT WITH BY STATE STATUTES" -- THEN IT IS UNCONSTITUTIONALLY VAGUE. THE VAGUENESS OF THIS SECTION, COUPLED WITH THE DEMONSTRATED VAGUENESS OF THE 'PATTERN' REQUIREMENT, RENDERS THE RICO STATUTE, AS A WHOLE UNCONSTITUTIONALLY VAGUE, BOTH ON ITS FACE AND AS APPLIED.

In his Petition, Point Two, pp46-64, Petitioner Eisen argues that the vagueness of 18 U.S.C. §1961(1)(A) coupled with the vagueness of the pattern requirement, renders the RICO statute unconstitutional. Petitioner adopts and joins in those arguments in support of his Petition for a Writ of Certiorari.

CONCLUSION

FOR THE REASONS STATED, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Dated: Manhasset, New York
December 4, 1992

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1311, 1312, 1313, 1315, 1324, 1325, 1327, 1491

August Term 1991

Argued: April 29, 1992 Decided: August 17, 1992

Docket Nos. 91-1549(L), -1551, -1552, -1553, -1554, -1555, -1633, 92-1032

UNITED STATES OF AMERICA,

Appellee,

—v.—

MORRIS J. EISEN, JOSEPH P. NAPOLI, HAROLD M. FISHMAN, DENNIS RELLA, MARTY GABE, GERALDINE G. MORGANTI, and ALAN WEINSTEIN,

Defendants-Appellants,

LEONARD KAGEL,

Defendant.

Before:

MESKILL, *Chief Judge*,
TIMBERS and NEWMAN, *Circuit Judges*.

Appeal from judgments of the United States District Court for the Eastern District of New York (Charles P.

Sifton, Judge), convicting defendants of RICO violations, in violation of 18 U.S.C. § 1962(c), (d) (1988), arising out of a law firm's fraudulent conduct of personal injury cases.

Affirmed.

ALAN M. DERSHOWITZ, New York, N.Y. (Nathan Z. Dershowitz, Dershowitz & Eiger, New York, N.Y.), *for defendant-appellant Eisen.*

JOSEPH P. NAPOLI, *pro se*, New York, N.Y.

STEVEN R. KARTAGENER, New York, N.Y. (Roger L. Stavis, Kartagener & Stavis, New York, N.Y., on the brief), *for defendant-appellant Fishman.*

RICHARD MISCHEL, New York, N.Y., *for defendants-appellants Rella and Morganti.*

MARTIN J. SIEGEL, New York, N.Y., *for defendant-appellant Gabe.*

RONALD E. DEPETRIS, New York, N.Y. (Seth F. Kaufman, Carro, Spanbock, Kaster & Cuiffo, New York, N.Y., on the brief), *for defendant-appellant Weinstein.*

FAITH E. GAY, Asst. U.S. Atty., Brooklyn, N.Y. (Andrew J. Maloney, U.S. Atty., Susan Corkery, David C. James, Peter A. Norling, Asst. U.S. Attys., Brooklyn, N.Y., on the brief), *for appellee.*

JON O. NEWMAN, *Circuit Judge*:

This is an appeal of RICO convictions arising from a law firm's fraudulent conduct of civil litigation as plaintiff's counsel in personal injury cases. The appeal is brought by Morris J. Eisen, Joseph P. Napoli, Harold M. Fishman, Dennis Rella, Marty Gabe, Geraldine G. Morganti, and Alan Weinstein from judgments of the United States District Court for the Eastern District of New York (Charles P. Sifton, Judge), following a four-month jury trial. We affirm.

Background

Morris J. Eisen, P.C. ("the Eisen firm") was a large Manhattan law firm that specialized in bringing personal injury suits on behalf of plaintiffs. The defendants, seven of the Eisen firm's attorneys, investigators, and office personnel, were tried jointly on two counts of conducting and conspiring to conduct the affairs of the Eisen firm through a pattern of racketeering activity, in violation of 18 U.S.C. §§ 1962(c), (d) (1988). The indictment alleged, as the underlying acts of racketeering, that each of the defendants committed, among other crimes, numerous acts of mail fraud, in violation of 18 U.S.C. § 1341, and bribery of witnesses, in violation of New York Penal Law § 215.00 (McKinney 1988).

Eisen was the founder, sole shareholder, and principal attorney of the Eisen firm. Napoli was associated with the Eisen firm in an "of counsel" capacity, and he was the main trial attorney for the firm. Fishman, a trial attorney, was also "of counsel" to the firm. The Eisen firm regularly used investigators to assist attorneys in the trial preparation of personal injury cases, and defendants

Weinstein, Gabe, and Rella were private investigators affiliated with the firm. Morganti was the office administrator of the Eisen firm with responsibility for managing the daily affairs of the firm, including assigning attorneys and investigators to particular cases, monitoring the firm's daily calendar, and managing the financial and personnel operations of the firm.

The evidence at trial established that the defendants conducted the affairs of the Eisen law firm through a pattern of mail fraud and witness bribery by pursuing counterfeit claims and using false witnesses in personal injury trials, and that the Eisen firm earned millions in contingency fees from personal injury suits involving fraud or bribery. The methods by which the frauds were accomplished included pressuring accident witnesses to testify falsely, paying individuals to testify falsely that they had witnessed accidents, paying unfavorable witnesses not to testify, and creating false photographs, documents, and physical evidence of accidents for use before and during trial. The Government's proof included the testimony of numerous Eisen firm attorneys and employees as well as Eisen firm clients, defense attorneys, and witnesses involved in the fraudulent personal injury suits. Transcripts, correspondence, and trial exhibits from the fraudulent personal injury suits were also introduced.

The racketeering acts considered by the jury related to the defendants' conduct with regard to 18 fraudulent personal injury lawsuits in which the plaintiff was represented by the Eisen firm. The defendants were found guilty of racketeering acts involving the following personal injury cases:

Eisen: *Mulnick*, *Schwartz*, *Stanton*;

Napoli: *Ferri*, *Mulnick*, *Robbins*, *Rehberger*;

Fishman: *Aboud, Schwartz, Tuning, Nieves*;

Rella: *Miceli, Rehberger, Schwartz*;

Gabe: *Robbins, Stanton, Nieves*;

Morganti: *Miceli, Schwartz, Stanton, Pietrafesa*;

Weinstein: *Aboud, Schwartz, Tuning, Nieves, Metrano*.

The jury convicted all seven defendants of RICO substantive and conspiracy offenses after three weeks of deliberations.[1]

Discussion

I. Legal Sufficiency of Charges

A. Mail Fraud

Weinstein argues that a scheme to deprive an adversary of money by means of a civil lawsuit conducted fraudulently does not constitute mail fraud because there is no deprivation of property as defined by the Supreme Court in *McNally v. United States*, 483 U.S. 350 (1987). In that case, the Supreme Court held that the mail fraud statute does not reach schemes to defraud citizens of their right to honest and impartial government but is instead "limited in scope to the protection of property rights." *Id.* at 360. Looking to the legislative history of the statute, which "indicates that its original impetus . . . was to protect the people from schemes to deprive them of their money and property," the Court concluded that

1 Rella's RICO conviction was vacated because the racketeering acts underlying that conviction were not committed within the limitations period.

> the words "to defraud" commonly refer to "wronging one in his property rights by dishonest methods or schemes," and "usually signify the deprivation of something of value by trick, deceit, chicane or overreaching."

Id. at 356, 358 (footnote and citation omitted). In reversing the convictions of defendants charged with scheming to deprive the state of its right to honest government by having a state agency share proceeds with business entities in which the defendants held interests, the Supreme Court emphasized that there was no allegation that the state or its citizens had been deprived of any money or property. *Id.* at 360-61.

Weinstein contends that the right of the civil defendants and their liability insurers to have a judgment in a civil proceeding obtained free of fraud and perjury is an intangible right not cognizable under the mail fraud statute. The Government responds that the mail fraud predicates at issue here allege a scheme to defraud that comports squarely with the *McNally* definition of mail fraud because the Eisen indictment explicitly alleges a scheme to deprive the victims of money.

Weinstein relies on *United States v. Eckhardt*, 843 F.2d 989 (7th Cir.), *cert. denied*, 488 U.S. 839 (1988). In *Eckhardt*, the defendant had operated a phony tax shelter scheme and had committed perjury and submitted false documents in a civil proceeding brought by his investors against the IRS to challenge disallowance of their deductions. The indictment charged him with a scheme

> To defraud the United States by impeding and impairing, obstructing and defeating the lawful functions of the Internal Revenue Service in the ascertainment, computations, assessment and collection of

> the revenue, to wit, income taxes of taxpayer-investors . . . .

843 F.2d at 996. The Seventh Circuit concluded that this allegation failed to allege mail fraud in light of *McNally*. It found that the indictment charged the defendant with

> interfering with the IRS's proper ascertainment and collection of income taxes. It does not specifically allege that he deprived the government of revenue. . . . [I]t is not sufficient to allege conduct which could have resulted in the government's failure to collect revenue owed to it. . . . The connection between the charged conduct and the loss of revenue here is too tenuous and speculative to constitute an actual deprivation of money or property.

Id. at 996-97.

Weinstein's reliance on *Eckhardt* is unavailing. The *Eisen* indictment contained precisely what was found to be lacking in the *Eckhardt* indictment: the allegation of a scheme to defraud the litigant of money or property. We have upheld charges similar to those made in *Eckhardt* where an indictment has alleged a scheme to defraud the Government of money. *See United States v. Porcelli*, 865 F.2d 1352 (2d Cir.), *cert. denied*, 493 U.S. 810 (1989) (upholding conviction for mail fraud against *McNally* challenge where defendant was charged with defrauding state government of its right to sue for sales tax he failed to collect); *United States v. Rubin*, 844 F.2d 979, 985-86 (2d Cir. 1988) (upholding conviction for mail fraud where defendant defrauded New York State of public revenues).

Weinstein next contends that even if the civil defendants were deprived of property, the only party "deceived" by the alleged fraud were civil juries that

awarded the money judgment. Because the juries were not claimed to have been injured, Weinstein argues that the "convergence theory" of mail fraud, which, he contends, requires that the party defrauded and the party injured be identical, *see United States v. Evans*, 844 F.2d 36, 39 (2d Cir. 1988), is not satisfied. Even if the "convergence theory" is applicable, which we do not decide,[2] its requirements are met here. Weinstein's argument that "the civil defendant is contesting, not relying on, the truth of the allegedly false testimony," Brief for Appellant Weinstein at 36, and is therefore not deceived by a corrupt adversary takes an unrealistically narrow view of the charges in this case and ignores settled authority that perjury and fake evidence defraud the adverse party.

First, a number of the mail fraud predicates in the indictment alleged fraud that was perpetrated directly on the civil defendants and their liability insurers before the lawsuit reached trial. In several cases, misrepresentations in pleadings and pretrial submissions were made in the hope of fraudulently inducing a settlement before trial. And in cases that went to trial, fraudulent representations concerning the claims were directed at the civil defendants and their insurers in an effort to induce settlement before verdict. In fact, several of the lawsuits listed in the indictment were settled. Even in cases decided by a jury, defendants' misconduct was intended to defraud their adversaries. Litigants depend on the integrity of the con-

2 Some District Courts in this Circuit have concluded that this Court's dicta in *Evans* stands only for the proposition that a civil RICO plaintiff must have been injured to have standing under section 1964. *See, e.g., Shaw v. Rolex Watch U.S.A.*, 726 F. Supp. 969, 972-73 (S.D.N.Y. 1989); *Galerie Furstenberg v. Coffaro*, 697 F. Supp. 1282, 1288 (S.D.N.Y. 1988). Other district courts outside this Circuit have rejected the convergence theory altogether. *See Texas Air Corp. v. Air Line Pilots Ass'n Int.*, No. Civ. 88-0804, 1989 U.S. Dist. LEXIS 11149 (S.D. Fla. July 14, 1989); *Lewis v. Lhu*, 696 F. Supp. 723, 727 (D.D.C. 1988).

duct of participants in civil proceedings though disputing the validity of their opponents' claims to impose or resist civil liability. It is one thing to challenge the perception, memory, or bias of an opponent's witnesses; it is quite another for a party's lawyer and a witness to concoct testimony that they know has been wholly fabricated.

Moreover, Weinstein's claim that perjured testimony suborned by the defendants was directed at the civil juries rather than at the other litigants ignores relevant case law. In *United States v. Rodolitz*, 786 F.2d 77 (2d Cir.), *cert. denied*, 479 U.S. 826 (1986), the defendant had brought a fraudulent civil action against his insurance company and recovered a money judgment from the company at trial. In affirming the defendant's conviction for mail fraud, this Court explicitly recognized that false evidence at a civil trial works a fraud not only on the jury but on the opposing party as well. *Id.* 786 F.2d at 80-81. *See also Averbach v. Rival Manufacturing Co.*, 809 F.2d 1016 (3d Cir.), *cert. denied*, 482 U.S. 915 (1987).

Weinstein also argues that the causation between the fraud and the resulting deprivation of property is too "attenuated." However, the Government need establish only an intent to harm; it is not required to prove that the victim was actually injured as a result of the scheme, *see United States v. Starr*, 816 F.2d 94, 98 (2d Cir. 1987), much less that any injury that did occur resulted solely from the fraud, *see Rodolitz*, *supra*. In *Rodolitz*, we found a sufficient causal link between the defendant's failure to disclose evidence in his trial to recover losses from his insurance company and the resulting judgment against the company, regardless of what the trial jury may actually have relied upon in reaching its verdict.

Finally, Weinstein contends that permitting the mail fraud offenses charged in the *Eisen* indictment to serve as RICO predicate acts conflicts with the deliberate decision made by Congress in omitting perjury as one of the enumerated RICO predicate offenses within the definition of "racketeering activity." *See* 18 U.S.C. § 1961(1). Contrary to the Government's abrupt dismissal of this argument as "baseless," Brief for Appellee at 36, we recognize that there is some tension between the congressional decision to include federal mail fraud as a predicate offense and to exclude perjury, whether in violation of federal or state law. That tension is illustrated by this prosecution in which the fraudulent scheme consists primarily of arranging for state court witnesses to commit perjury.

Though the tension exists, we do not believe it places the indictment in this case beyond the purview of RICO. Congress did not wish to permit instances of federal or state court perjury as such to constitute a pattern of RICO racketeering acts. Apparently, there was an understandable reluctance to use federal criminal law as a back-stop for all state court litigation. Nevertheless, where, as here, a fraudulent scheme falls within the scope of the federal mail fraud statute and the other elements of RICO are established, use of the mail fraud offense as a RICO predicate act cannot be suspended simply because perjury is part of the means for perpetrating the fraud. We do not doubt that where a series of related state court perjuries occurs, it will often be possible to allege and prove both a scheme to defraud within the meaning of the mail fraud statute as well as the elements of a RICO violation. But in such cases, it will not be the fact of the perjuries alone that suffices to bring the matter within the scope of RICO. In any event, we cannot carve out from the coverage of

RICO an exception for mail fraud offenses that involve state court perjuries.

B. State Law Bribery

1. *"Witness" as required by §215.00 of New York Penal Law.* Weinstein, Rella, Morganti, and Fishman all attack various witness bribery racketeering acts by arguing that the individual allegedly bribed was not a "witness or a person about to be called as a witness" within the meaning of Section 215.00 of the New York Penal Law. The statute provides in pertinent part:

> A person is guilty of bribing a witness when he confers, or offers or agrees to confer, any benefit upon a witness or a person about to be called as a witness in any action or proceeding upon an agreement or understanding that (a) the testimony of such witness will thereby be influenced, or (b) such witness will absent himself from, or otherwise avoid or seek to avoid appearing or testifying at, such action or proceeding.

N.Y. Penal Law § 215.00 (McKinney 1988)

The New York Court of Appeals has held that a person's status as a witness under section 215.00 "depends upon the evidence he can supply the court, not the immediacy of the need for the evidence," nor whether a subpoena has been issued in order to secure it. *People v. Bell*, 538 N.Y.S.2d 754, 760, 73 N.Y.2d 153, 164 (1989). The Court stated that if "the evidence is sufficient to support a finding that defendant reasonably should have believed that the person would be a witness and that he intentionally attempted to influence the witness's testimony . . . the crime is complete." *Id.*

Weinstein challenges the witness bribery racketeering act in one of the fraudulent tort cases, *Metrano*, on the ground that there was insufficient evidence that Alberto Troche was a "witness or a person about to be called as a witness" within the meaning of section 215.00. The *Metrano* case arose from injuries sustained by Metrano when he was shot in the leg by a Manhattan parking lot attendant, Alberto Troche, during a row over a parking lot fee. Metrano subsequently retained the Eisen firm, which brought a civil suit against Troche and Troche's employer, Simone Grossman. The action against Grossman was based on allegations that Grossman should have known that Troche was dangerous and carried a gun. The Eisen firm retained Weinstein as the investigator on the case, which settled on the eve of trial for $300,000.

At the *Eisen* trial, Troche testified that Weinstein had come to his home and offered him $5,000 to testify that his employer was aware that he had dangerous propensities and that he carried a gun. Troche had secretly taped this meeting, and the tape was introduced into evidence at the *Eisen* trial.

Troche, having inflicted the injury that formed the basis of the tort action, was clearly someone Weinstein reasonably should have believed would be a witness in the case. On the tape, Weinstein made repeated references to what Troche must do "when he comes to court" or when he "takes the stand," showing that he clearly anticipated that Troche would be a key witness in the case.

In an effort to avoid Troche's obvious status as a witness, Weinstein argues that he did not commit bribery against Troche, but that Troche committed extortion against him. The extortionate conduct, he contends, defeats a section 215.00 violation because it negates the

essential element of *mens rea* in the crime of bribery. Although the tape recording provides some support for Weinstein's contention that Troche might have offered his testimony to the highest bidder, other aspects of the tape recording and Troche's testimony at the *Eisen* trial provide sufficient evidence that Weinstein had the requisite intent to bribe Troche and that Weinstein's conduct fits easily within the proscription of section 215.00. Both the tape recording and the trial testimony reveal that Weinstein initiated the contact with Troche, that Weinstein was the first to broach the subject of money during their taped meeting, and that Weinstein described the testimony he sought to buy from Troche. Clearly a reasonable jury could find that Troche was a "person about to be called as a witness" in the *Metrano* trial and that Weinstein had the requisite intent to bribe Troche.

Rella argues that Eddie Goldstein, who testified in the *Rehberger* case was not a "witness" within the meaning of section 215.00, and Morganti makes the same claim with respect to Arnold Lustig, who testified in the *Schwartz* and *Aboud* cases, because neither Goldstein nor Lustig had observed the accidents about which they testified but were paid to offer completely fraudulent testimony. The claim that Goldstein and Lustig do not meet the statutory definition of "witness" because their testimony was entirely fraudulent and thus they had no "evidence" to supply the court is frivolous. In the dictionary sense, a witness is "one who, being present, personally sees or perceives a thing," or one "whose declaration under oath (or affirmation) is received as evidence for any purpose." *See Black's Law Dictionary* 1438 (5th ed. 1979). Section 215.00 contains no indication that it is limited to this core definition of this term to the exclusion of a more functional definition. The section, which explicitly reaches

attempts to influence the testimony of a "witness" as well as those "about to be called as a witness," applies to benefits conferred in order to induce someone to hold himself out *as* a witness and offer wholly fraudulent testimony to the court. The statute is not limited to payments for testimony that is false only in part. Both Goldstein and Lustig were paid money to give false testimony, both were prepared to testify falsely, and both were called to testify falsely at personal injury trials. It is of no consequence that the "evidence" offered and the status of the men as "witnesses" was entirely an outgrowth of the defendants' criminal designs.

2. *Falsity of influenced testimony.* Section 215.00 provides in pertinent part that a person is guilty of bribing a witness "when he confers or offers or agrees to confer, any benefit upon a witness or a person about to be called as a witness . . . upon an agreement or understanding that (a) the testimony of such witness will thereby be influenced, ..." On its face, the statute requires just two elements of proof: the offer of a benefit to a witness and the agreement or understanding that the witness's testimony will be influenced by such benefit. *See People v. Shaffer*, 130 A.D.2d 431, 432, 515 N.Y.S.2d 470, 471 (1st Dep't 1987) ("All that is required for a bribery to be complete is the offer or agreement to confer a benefit upon the defendant's agreement or understanding that the witness' testimony will thereby be influenced."). "Understanding," as used in the statute, has long been construed as tantamount to the *defendant's* intent, *see People v. Kathan*, 136 A.D. 303, 120 N.Y.S. 1096 (1910), and it is not necessary for conviction that the jury find that the bribe's intended recipient shared that intent. *See People v. Kramer*, 132 Misc. 2d 753, 505 N.Y.S.2d

769 (2d Dep't), *modified on other grounds*, 132 A.D.2d 708, 518 N.Y.S.2d 189 (2d Dep't 1986). The statute contains no requirement that the benefit actually be conferred or that the testimony actually be influenced. *See Shaffer*, 130 A.D.2d at 432, 515 N.Y.S.2d at 471.

Weinstein argued in the District Court that section 215.00 requires two additional elements of proof: (a) that the defendant subjectively believe that testimony, "influenced" as he desires, would be untruthful and (b) that testimony so "influenced" would in fact be untruthful. Although the District Judge originally incorporated both requirements in the proposed charge, he reconsidered his view following the Government's timely objection. Weinstein now complains about the substance and the timing of that ruling.

The charge that Judge Sifton ultimately gave incorporated one of the elements proposed by Weinstein. He instructed the jurors that with respect to the intent element on the charge of witness bribery, they must find that the defendant paid money to a witness in order to get the witness to modify the substance of his testimony in a way that the defendant believed would be false. He did not instruct the jury that it would be a defense to the crime if by sheer happenstance the testimony so influenced turned out to be true.

The essence of bribery is the intent to influence improperly the conduct of another by bestowing a benefit, *see* 39 N.Y. Penal Law § 215.00, at 553 (Practice Commentaries) (McKinney 1988); as there is no requirement that the intended result be accomplished, *see Shaffer*, 130 A.D.2d at 432, 515 N.Y.S.2d at 471, the District Judge properly refused to charge the jury that the fortuity

that the testimony, as "influenced," turned out to be truthful would be a defense to the charge.[3]

Weinstein also complains that the District Court's charge on the elements of bribery violated Rule 30 of the Federal Rules of Criminal Procedure, requiring a trial court to issue rulings on requests to charge prior to summations in order to afford the parties an opportunity to frame their closing remarks in light of the court's subsequent legal instructions. *See United States v. Lyles*, 593 F.2d 182, 186 (2d Cir.), *cert. denied*, 440 U.S. 972 (1979); *United States v. Tourine*, 428 F.2d 865, 868-69 (2d Cir. 1970), *cert. denied*, 400 U.S. 1020 (1971). If the Rule is violated, reversal is required where the defendant can show that he was "substantially misled in formulating his arguments" or otherwise prejudiced. *United States v. Smith*, 629 F.2d 650, 653 (10th Cir.), *cert. denied*, 449 U.S. 994 (1980). *See Lyles*, 593 F.2d at 186; *United States v. Conlin*, 551 F.2d 534, 539 (2d Cir.), *cert. denied*, 434 U.S. 831 (1977).

Weinstein was not prejudiced by Judge Sifton's decision, made after the charging conference, to revise the proposed charge as to the elements of witness bribery. When the issue was raised in the charging conference, the Government objected to the proposed charge. Following an exchange between the Court and the Government on the question of whether the Government had to prove the actual falsity of the testimony sought by the defendant, Judge Sifton said, "All right. I'll consider that exception."

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3 The Government argues that the bribery statute properly applies whenever money is paid to influence testimony, even if money is paid to secure what the defendant believes is truthful testimony. Because the Judge's charge required the jury to find that the defendant believed that he was seeking to influence testimony in a false direction, we need not decide if section 215.00 extends to payments to influence a witness to testify truthfully.

Weinstein was on notice that his requested charge was the subject of further consideration and could not have been "substantially misled" by the Court in formulating his summation argument, which contended that the Government had to prove the actual falsity of the testimony sought. *Cf. Wright v. United States*, 339 F.2d 578, 579-80 (9th Cir. 1964) (reversal required where court did not respond to defense request for pre-summation rulings on requests to charge, advised counsel to "go ahead and argue the case any way you want to argue it," and in its charge rejected the theory of defense offered in summation). Moreover, following the summation, the Court advised Weinstein's counsel that the charge was not in accord with his argument and offered counsel an opportunity to address the jury again. Having ignored this offer, counsel has no valid claim of prejudice.

II. Sufficiency of Evidence

A. The *Mulnick* Case—Racketeering Act Three

The jury found Eisen guilty of witness bribery and found Eisen and Napoli guilty of mail fraud in connection with the *Mulnick* case. Both Eisen and Napoli contend that the evidence presented at trial was insufficient to prove beyond a reasonable doubt that they committed mail fraud in connection with the *Mulnick* case. Both defendants also contend that invalidation of the *Mulnick* predicate would undermine their RICO substantive and conspiracy convictions. Relying on the standard recently employed by this Court in *United States v. Paccione*, 949 F.2d 1183, 1198 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 3029 (1992), defendants argue that in a RICO case, where one or more predicates is held invalid on appeal, the RICO conviction cannot stand unless the error in sub-

mitting the invalid predicate to the jury is demonstrated to be harmless beyond a reasonable doubt.[4] Upon careful review of the record, we conclude that the defendants' sufficiency arguments are unavailing.

The *Mulnick* case arose out of injuries suffered by Beth Mulnick in 1979 when she was struck by a car as she was crossing a Manhattan street with her friend Patti Kibel. The Eisen firm sued the car's driver on Mulnick's behalf. Napoli was the attorney assigned to the case, which settled for $1 million after the trial testimony of Patti Kibel. At the *Mulnick* trial, Kibel had testified that Mulnick was crossing the street with the light and within the crosswalk, dropped her glove, and returned several paces to retrieve it, and that the car then ran into her while she was in the crosswalk with the light still in her favor.

At the *Eisen* trial, Kibel testified that her testimony at the *Mulnick* trial had been false and that various Eisen firm lawyers, including Eisen and Napoli, caused, or acquiesced in, her false testimony that Mulnick had been crossing with the light. Eisen and Napoli contend that Kibel's testimony at the *Eisen* trial was too equivocal to support a jury finding that Eisen or Napoli either prepared or caused Kibel to testify falsely at the *Mulnick* trial.

With respect to Napoli, Kibel testified at the *Eisen* trial that, prior to her testimony at the *Mulnick* trial, she told the man who "prepared" her that her anticipated testimony about the accident was false. Although Kibel could not recall the identity or appearance of the lawyer who con-

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4 In *Paccione*, the Court found that there was no doubt that the jury would have convicted defendant Paccione of a RICO violation even in the absence of the invalid predicate because eight valid predicates remained and because the pattern of verdicts returned against co-defendants on the RICO count demonstrated that the invalid predicate was not an ingredient in the jury's RICO verdicts.

ducted this trial, it was established through the testimony of other witnesses and documentary evidence that Napoli was the Eisen firm trial attorney who questioned witnesses at the *Mulnick* trial. Contrary to Napoli's suggestion, the Government was not required to prove that he specifically formulated the lie to which Kibel was to testify. Instead, as the indictment charged, the Government needed to establish that Napoli had either prepared or caused Kibel to testify falsely. To prove this, it was plainly sufficient to establish that Kibel told Napoli the truth about the Mulnick accident but that Napoli did nothing to dissuade her from testifying to the false version conjured by the Eisen firm and that he caused her to testify falsely by putting her on the stand and eliciting the perjurious testimony from her.

With respect to Eisen, Kibel's testimony is even more indefinite. Eisen claims that Kibel's wavering testimony at the *Eisen* trial is insufficient proof that he was the person who instructed Kibel to provide false testimony in connection with the *Mulnick* case. Kibel's recollection was vague as to the details of her conversations with Eisen, but on direct examination she stated that she told Eisen the truth about Beth Mulnick's accident and that he instructed her to give a false account of how the accident occurred. However, when questioned on cross-examination as to any particular element of the fabricated story offered by her at the *Mulnick* trial, Kibel could not recall whether Eisen or someone else in the Eisen firm had suggested the alteration. The Government argues that Kibel's assertion on direct that Eisen instructed her how to testify is not invalidated by her inability to remember on cross-examination what Eisen had said to her on specific topics and who precisely had caused her to testify as she did to particular aspects of her testimony. The Government

argues that the weakness of Kibel's testimony was a matter for cross-examination, and that any apparent tension in her testimony was a matter of credibility to be resolved by the jury.

We need not decide whether Kibel's equivocal testimony constituted sufficient evidence to support the jury's finding with respect to the mail fraud allegation against Eisen specified in the *Mulnick* predicate act, racketeering act 3. That act (one of three charged against Eisen) alleged that Eisen engaged in criminal activity in connection with the *Mulnick* case in two distinct ways: (1) that he committed mail fraud for the purpose of executing a scheme to prepare and cause Patti Kibel to testify falsely at trial, and (2) that he caused another person to bribe a New York City Police Officer who was about to be called as a witness in connection with the case. The jury indicated on the verdict form that it found Eisen had committed racketeering act 3 both by committing witness bribery and mail fraud. Eisen does not allege any infirmity with the jury's finding on the witness bribery aspect of the *Mulnick* predicate.[5]

A finding either of mail fraud or of witness bribery would have been sufficient to support the *Mulnick* racketeering act. Thus the invalidation of one of two sufficient bases *specifically* found by the jury to support this predicate would not undermine the jury's finding that Eisen committed a racketeering act with respect to the *Mulnick*

5 Officer William Mulligan testified at the *Eisen* trial that he wrote the original police report of the Mulnick accident, which indicated that Kibel had stated at the time of the accident that Mulnick was crossing the street against the light. He further testified that he had been offered a bribe several days before the *Mulnick* trial by Eisen firm investigator Frank Laine to testify that he could not recall Kibel's statement. Laine, who testified under a grant of immunity at the *Eisen* trial, admitted that he had indeed attempted to bribe the officer and had done so at Eisen's request.

case. *Cf. Griffin v. United States*, 112 S. Ct. 466, 469-74 (1991) (even a *general* verdict in a criminal case is to be upheld on appeal against a claim of insufficient evidence to support one of alternative bases for conviction whenever the evidence suffices for at least one basis). In light of the fact that Eisen's challenge does not compromise the validity of the *Mulnick* predicate, and the ample evidence that the *Mulnick* case was fraudulent and that Eisen participated in the fraud, we have no doubt that the jury would have convicted Eisen on the RICO substantive and conspiracy charges even if it had found that the *Mulnick* racketeering act rested only on bribery. *Cf. Paccione*, 949 F.2d at 1198 (jury would have convicted defendant of a RICO violation even in the absence of an *invalid* predicate).

B. The *Pietrafesa* Case—Racketeering Act Twenty-Six

Morganti claims that there was insufficient evidence that she committed mail fraud in connection with the *Pietrafesa* case. That case arose from injuries sustained by Carmella Pietrafesa when she slipped on a sidewalk outside a supermarket in Greenwich Village. The Eisen firm sued the supermarket on behalf of Pietrafesa. The Eisen firm relied on the testimony of Morganti's 70-year-old mother, Helen Gaimari, who lived four blocks from the supermarket, to establish that the supermarket had prior notice of the sidewalk defect. At trial, Gaimari testified that she gave Pietrafesa her name at the time of the accident, had fallen because of the same defect months before, and had previously complained to the supermarket about the defect. It was not disclosed to defense counsel in the *Pietrafesa* case that Gaimari was the mother of Morganti, the Eisen firm's office manager. The jury

returned a verdict for Pietrafesa of approximately $35,000.

Morganti argues that the Government adduced no affirmative evidence that Morganti caused her mother to testify, or that her mother, Helen Gaimari, testified falsely. In evaluating this claim we must credit every inference that can be drawn in the Government's favor, whether from direct or circumstantial evidence. *See, e.g., United States v. Parker*, 903 F.2d 91, 96-97 (2d Cir.), *cert. denied*, 111 S. Ct. 196 (1990). Moreover, the jury is free to draw negative inferences from an untruthful witness's testimony as long as there is affirmative testimony to supplement or corroborate those negative inferences. *See United States v. Marchand*, 564 F.2d 983, 985-86, 1000-01 (2d Cir. 1977), *cert. denied*, 434 U.S. 1015 (1978).

The Government points to the testimony of five witnesses to support the inference that Morganti caused her mother to testify and that the testimony was false. The plaintiff, Carmella Pietrafesa, testified in a deposition preceding her personal injury trial that she had not gotten the names of the people who helped her up at the time of her accident. In contrast, she testified at her own trial and at the *Eisen* trial that an elderly woman who turned out to be Gaimari picked her up and gave her a piece of paper containing Gaimari's name and number. Pietrafesa also testified at the *Eisen* trial that during the course of trial preparation she had had a few discussions with Morganti concerning her case.

Frank DeSalvo, an Eisen firm attorney, testified about his handling of the *Pietrafesa* case. He stated that he sent out a letter to defense counsel on November 11, 1982, stating that there were no witnesses to Pietrafesa's accident. DeSalvo testified that he represented Pietrafesa at

the December 20, 1982, deposition in which she stated that she did not get the name of the person who helped her up. He further testified that he sent a second letter to defense counsel in the *Pietrafesa* case three days after the deposition that listed Helen Gaimari, Morganti's mother, as a notice witness to Pietrafesa's accident. However, even though DeSalvo had dated Morganti's daughter and had met Gaimari, he claimed to know the older woman only as "Grandma Helen."

Evan Torgan, another attorney formerly associated with the Eisen firm, testified that Morganti and Eisen assigned him the cases that he tried at the Eisen office, that he had tried the *Pietrafesa* case in November 1984, and that it was his practice to report trial verdicts to Morganti. He further testified that he was dating Morganti's daughter around the end of 1984 or the beginning of 1985 but also claimed that he did not learn that Gaimari was Morganti's mother until after the *Pietrafesa* trial ended.

Gaimari testified at the *Eisen* trial that sometime after the accident, she was called by a lawyer who asked her to testify at the *Pietrafesa* trial; the lawyer indicated that he knew Gaimari was Morganti's mother.

Robert Steindorf, a defense attorney at the *Pietrafesa* trial, testified that Gaimari was a crucial witness against his client because she was the only notice witness at that trial who was not related to Pietrafesa.

Giving credence to every inference that could be drawn in the Government's favor from the direct and circumstantial evidence elicited from these witness, we find that a reasonable juror could find that Gaimari gave false testimony concerning her presence at the Pietrafesa accident. We are, however, unable to conclude that a reasonable juror could find, beyond a reasonable doubt, that Mor-

ganti caused Gaimari to give false testimony in the *Pietrafesa* case. The Government invites us to rely on Morganti's familial relation to Gaimari as well as Morganti's role in the Eisen firm. While these factors may indicate that Morganti had abundant opportunity to cause Gaimari to give false testimony, they provide an insufficient basis for a reasonable juror to conclude beyond a reasonable doubt that Morganti played a role in having her mother testify falsely at the *Pietrafesa* trial. Although, having persuaded the jury that Gaimari was untruthful, the prosecutor might have invited the jury to disbelieve Gaimari's denials of her daughter's involvement, without affirmative evidence in corroboration, such a negative inference is, by itself, insufficient to support the conviction. *Marchand*, 564 F.2d at 986. "A jury's verdict will be sustained if there is *substantial evidence*, taking the view most favorable to the government, to support it." *United States v. Mulheren*, 938 F.2d 364, 368 (2d Cir. 1991) (citations omitted) (emphasis in original). In this case Morganti has met the very heavy burden of demonstrating that the evidence at trial was insufficient to prove her guilt beyond a reasonable doubt.

We must now determine whether the invalidation of this racketeering act undermines Morganti's substantive and conspiracy RICO convictions. We conclude that the error in submitting the invalid predicate to the jury was harmless beyond a reasonable doubt. *See Paccione*, 949 F.2d at 1198. Three valid racketeering acts remain, those relating to the *Miceli*, *Schwartz*, and *Stanton* cases. In each of these cases there was direct and unequivocal testimony that Morganti was an active participant in the cabal to falsify testimony. Furthermore, the pattern of verdicts returned against co-defendants confirms our conclusion that the jury would have returned the RICO convictions in

the absence of the invalid predicate. Eisen, Gabe, and Rella were convicted of the RICO counts on the basis of a jury finding that they had each committed three racketeering acts. Morganti shares a pair of valid predicates in common with those of Eisen and Rella: Morganti and Eisen were both found guilty of the *Schwartz* and *Stanton* predicates; Morganti and Rella were both found guilty of the *Miceli* and *Schwartz* predicates. The acts alleged against Morganti in the *Miceli*, *Schwartz*, and *Stanton* predicates occurred, respectively, in 1983, in 1984, and between 1984 and 1988, and thus the substantive RICO conviction remains timely. The jury has already found that these predicates relate to each other as well as to the enterprise, and because we have no hesitancy in finding that, even without the *Pietrafesa* predicate, these three racketeering predicates posed a threat of continuity, we affirm Morganti's substantive and conspiracy RICO convictions. *See United States v. Minicone*, 960 F.2d 1099, 1106 (2d Cir.) (to establish pattern of racketeering, prosecution must show racketeering predicates are horizontally and vertically related, and that they amount to or pose threat of continued criminal activity), *cert. denied*, 112 S. Ct. 1511 (1992).

III. Leak of Grand Jury Testimony

Eisen argues, on behalf of all defendants, that he is entitled to a hearing on his claim that he was prejudiced by a leak of grand jury testimony. Shortly before the trial began, *The Village Voice* published an article about the case. The author of the article purported to summarize the contents of the testimony of four grand jury witnesses and indicated that the source of the information was not the witnesses themselves. In fact, the story indicated that one of the witnesses whose testimony was outlined had

refused to speak to the *Voice* about his grand jury appearance. After the publication of the article, Eisen moved for a hearing to determine whether grand jury secrecy had been violated. Eisen claimed that a leak could prejudice his trial because trial witnesses exposed to the article could tailor their testimony to dovetail with the sworn testimony of others. The District Court denied the request for a hearing but referred the case to the Department of Justice ("DOJ"), requesting an expedited investigation.

After trial, almost seven months since the matter was referred to DOJ and in spite of some prodding by Judge Sifton, little if any progress had been made on the investigation, and Eisen renewed his request for a court hearing. The Government was quick to ascertain the status of the DOJ investigation and informed the Court that DOJ investigators had formed a preliminary plan for investigation and would soon begin to conduct interviews concerning the matter. The District Court again rejected Eisen's request, stating that it had no obligation to supervise or instigate an investigation in the absence of a *prima facie* showing of prejudice to the defendant as a consequence of the alleged leak. The Judge noted that Eisen had had opportunity and incentive to develop evidence of "cross-pollination" among witnesses due to the alleged leak but had failed to do so. The Court also noted its reluctance to hold a hearing while there was an ongoing federal investigation.

At oral argument of this appeal, the Government maintained that the DOJ investigation had concluded, that the investigation had shed no light on whether or how the integrity and secrecy of the grand jury proceeding had been compromised, and that the results of the investigation had been forwarded to Eisen's counsel. The Gov-

ernment also represented to this Court that the results would be forwarded to the District Court.

A breach of grand jury secrecy can jeopardize the defendant's right to a fair trial before a petit jury. *See United States v. Friedman*, 854 F.2d 535, 583 (2d Cir. 1988), *cert. denied*, 490 U.S. 1004 (1989). However, a defendant seeking reversal or a hearing regarding alleged grand jury abuse must show prejudice or bias. *See id.* at 583-84 (in the absence of showing of prejudice, district court's refusal, without holding a hearing, to grant post-trial relief for alleged grand jury leaks not error); *see also United States v. Helmsley*, 866 F.2d 19, 22 (2d Cir. 1988) (noting approval of district court procedure of referring to Department of Justice charges of prosecutorial misconduct in leak of grand jury testimony), *cert. denied*, 490 U.S. 1004 (1989).

Eisen contends that he has made a *prima facie* showing of prejudice. He asserts that the trial record indicated that cross-pollination as a result of the grand jury leaks seemingly had occurred in at least one instance: one witness's testimony in the grand jury about backdating a report, disclosed in the *Voice* article, was echoed in another witness's trial testimony about the report, although that witness had never mentioned any backdating at his grand jury appearances. While this confluence of testimony may be suspect, we agree with the District Court that the defendants had the opportunity and incentive to develop such possibilities of prejudice into evidence of prejudice during the cross-examination of witnesses.

Eisen argues that it would have been "foolhardy" to seek to establish evidence of cross-pollination during cross-examination, that a defendant should not be required to pursue an agenda distinct from his trial

agenda, and that he should not be faulted for forgoing the opportunity where he was led to believe that the DOJ was making prompt inquiries. We disagree. If, on cross-examination a defendant had been able to expose that prosecution witnesses had changed their testimony in response to the testimony of other witnesses, that fact would have been devastating to the Government and entirely consistent with the defendant's "trial agenda." Moreover, a defendant's interest in showing that the Government's case has profited from a breach of grand jury secrecy, is distinct from the DOJ's inquiry into whether a leak has occurred and who was responsible. Referring the matter to the DOJ did not absolve Eisen of the obligation to discover and come forward with some evidence of prejudice, if any existed, in order to obtain a hearing or further relief on the ground that grand jury secrecy had been violated. The District Court did not err in denying a hearing.

IV. Testimony from Hostile Government Witnesses

Eisen argues that he was deprived of a fair trial because the Government was permitted to call numerous witnesses associated with the defendants and to elicit from them trial testimony that the Government anticipated would be, and argued to the jury that it was, perjurious. In its opening, the prosecution told the jury that it would call some witnesses "who have refused to give up the lie or the fraud of the particular case that they were involved in." The Government made this argument with regard to a portion of the testimony of 11 of its 75 witnesses. The District Judge allowed the practice, reasoning that it was not unduly prejudicial because the witnesses' testimony, in fact, tended to exculpate the defendants, and because the prosecutor confined himself to arguing that each witness persisted in his lie from personal motives rather than at

the behest of the defendants. Eisen argues that this evidence should have been excluded because it was irrelevant, and even if it was relevant, Eisen argues, it should have been excluded because the danger of unfair prejudice substantially outweighed its probative value.

Eisen contends that the testimony from these witnesses exculpating the defendants was not probative of the Government's theory of the case and therefore should not have been presented to the jury. The Government notes, however, that impeachment of hostile government witnesses is admissible as negative inference evidence, *see Marchand*, 564 F.2d at 985-86, and that the testimony of these hostile witnesses provided other affirmative proof that was important to the Government's case.

In arguing that this practice should not have been permitted, Eisen relies on two sets of cases that are clearly distinguishable. First, Eisen points to a series of cases that hold that while a jury may be permitted to draw negative inferences from disbelieved testimony, a case cannot go to a jury solely on that basis.[6] Second, Eisen relies on a series of cases that hold that a party may not call a witness whose testimony it knows to be adverse for the sole

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6 *See Martin v. Citibank, N.A.*, 762 F.2d 212, 217-18 (2d Cir. 1985); *United States v. Jenkins*, 510 F.2d 495, 499 (2d Cir. 1975); *Davis v. National Mortgage Corp.*, 349 F.2d 175, 178 (2d Cir. 1965); *Dyer v. MacDougall*, 201 F.2d 265, 269 (2d Cir. 1952); *Pariso v. Towse*, 45 F.2d 962, 964 (2d Cir. 1930).

In *Dyer v. MacDougall*, Judge Learned Hand observed that "the denial of one, who has a motive to deny, may be uttered with such hesitation, discomfort, arrogance or defiance, as to give assurance that he is fabricating, and that, if he is, there is no alternative but to assume the truth of what he denies." 201 F.2d at 269. However, the Court went on to hold that "although it is therefore true that in strict theory a party having the affirmative might succeed in convincing a jury of the truth of his allegations in spite of the fact that all the witnesses denied them, we think it plain that a verdict would nevertheless have to be directed against him." *Id.*

purpose of impeaching him and thereby presenting evidence to the jury that would not otherwise be admissible.[7] The first line of cases is inapposite because in this case there was independent evidence to support the Government's case. The second line of cases is inapplicable because the Government did not call these witnesses as a mere subterfuge to get before the jury evidence not otherwise admissible.

Federal Rule of Evidence 607 provides: "The credibility of a witness may be attacked by any party, including the party calling the witness." Rule 607, having no special restrictions, allows the Government to impeach its own witnesses. *United States v. DeLillo*, 620 F.2d 939, 946-47 (2d Cir.), *cert. denied*, 449 U.S. 835 (1980). Where the Government has called a witness whose corroborating testimony is instrumental to constructing the Government's case, the Government has the right to question the witness, and to attempt to impeach him, about those aspects of his testimony that conflict with the Government's account of the same events. *Id.* Here, the testimony of the hostile witnesses provided affirmative proof that was necessary to construct the Government's case, and thus the Government was entitled to question these witnesses and to invite the jury to disbelieve that portion of their accounts that contradicted the prosecution's theory of the case.

Eisen claims that, if the Government is allowed to proceed in this fashion, it could "routinely pre-empt the defendant, offer his 'defense,' and effectively preclude him from presenting his case as he and his lawyers determined to be in his best interests." Brief for Appellant Eisen at 31 n.34. Eisen complains that in eliciting testi-

7 *See United States v. Morlang*, 531 F.2d 183, 189-90 (4th Cir. 1975); *United States v. Johnson*, 802 F.2d 1459, 1466 (D.C. Cir. 1986).

mony exculpatory of the defendants, the Government, in essence, foisted witnesses and testimony onto the defendants' case thereby curtailing their ability to shape their own defense. Certainly, a defendant should be allowed to present his best defense consistent with the bounds of the law and the limits of the practicable. But the defendants cannot blame the Government's actions in this case for frustrating their ability to put on such a defense. The Government called as witnesses those who had participated in various ways in the personal injury suits underlying the allegations in the indictment and who clearly had relevant evidence to offer the Court. The Government need not confine itself to fragments of their testimony just because the witnesses persist in repeating untruthful portions.

A finding that the evidence was relevant and that the practice at issue is not proscribed does not, however, end the inquiry. Under Federal Rule of Evidence 403, the trial judge must determine if relevant evidence should be excluded because its "probative value is substantially outweighed by the danger of unfair prejudice." *United States v. Robinson*, 560 F.2d 507, 513-14 (2d Cir. 1977) (in banc), *cert. denied*, 435 U.S. 905 (1978). We give the trial judge wide discretion in assessing the balance, and his ruling will not be overturned unless he acted "arbitrarily or irrationally." *Id.* at 515. Eisen does not argue that the Government introduced highly prejudicial or inflammatory evidence in order to impeach these witnesses; instead he argues that, in the context of a case revolving around the subornation of perjury, the very argument that the witnesses were lying was highly prejudicial. Eisen contends that because the defendants are accused of suborning these witnesses' perjury (or conspiring with them to suborn perjurious testimony) in the underlying personal injury trials, the jury will naturally assume that the Gov-

ernment accuses the defendants of complicity in these criminal trial lies as well. The Court, however, had foreclosed this line of argument and the prosecutor was careful to attribute the alleged lies to the personal motivations of these witnesses. The District Court acted reasonably in concluding that the negative inference evidence need not be excluded as unfairly prejudicial simply because of the risk that the jury might, nonetheless, embrace a theory of causation eschewed by the prosecution.

V. Statute of Limitations

Gabe and Rella both contend that their convictions are barred by the five-year statute of limitations period of 18 U.S.C. § 3282 (1988). Gabe argues that all of the racketeering acts with which he is charged fall outside the five-year limitations period. In making this argument, Gabe incorrectly assumes that the mail fraud claims date from the time the fraud was conceived or from the time of the underlying civil trial. However, the statute of limitations in a mail fraud case runs from the date of the charged mailing, notwithstanding that the defendant's actions concerning the scheme to defraud occurred before the statutory period. *See United States v. Read*, 658 F.2d 1225, 1240 (7th Cir. 1981); *United States v. Ashdown*, 509 F.2d 793, 797-98 (5th Cir.), *cert. denied*, 423 U.S. 829 (1975). *See also United States v. Weinberg*, 656 F. Supp. 1020, 1026 (E.D.N.Y. 1987). Because at least one of the proven mailings in the racketeering acts of which Gabe was found guilty occurred within five years of the filing of the original indictment, Gabe's timeliness claim fails.

Rella argues that because the substantive RICO count against him was dismissed as untimely, the RICO conspiracy count must fail as well. All three of the racketeering acts that the jury found Rella to have committed

fall outside of the five-year limitations period, and thus the substantive RICO count was properly dismissed. However, the statute of limitations for a RICO conspiracy does not begin to run until the objectives of the conspiracy have been either achieved or abandoned. *United States v. Persico*, 832 F.2d 705, 713 (2d Cir. 1987), *cert. denied*, 486 U.S. 1022 (1988). The jury found that the RICO conspiracy comprehended conduct that occurred as late as 1988, and because there was no evidence that the criminal objectives of the conspiracy were abandoned, this count against Rella was not time-barred.

VI. Ineffective Representation

Napoli appeals from Judge Sifton's denial of his section 2255 petition for a new trial. In that petition, Napoli claimed that his Sixth Amendment rights to effective assistance of counsel had been violated as a result of an alleged conflict of interest of his trial counsel, Gerald L. Shargel. The alleged conflict of interest was said to arise from Shargel's disqualification in an unrelated case, *see United States v. Gotti*, 771 F. Supp. 552 (E.D.N.Y. 1991), which occurred during the trial of this case. We affirm the District Court's denial of the petition.

Napoli argues that Shargel's disqualification in the *Gotti* case resulted in both a *per se* and an actual deprivation of Napoli's Sixth Amendment right to effective assistance of counsel in this case. In order to sustain a claim that a *per se* violation occurred, a defendant must establish that his lawyer suffered from an actual conflict of interest with regard to presenting a vigorous defense of the defendant. *See United States v. Aiello*, 900 F.2d 528, 530-31 (2d Cir. 1990). Upon a showing of such a conflict, a defendant need not demonstrate prejudice because a conflict inhibiting a lawyer's performance is such an

affront to the right to effective assistance of counsel that we have found that such a circumstance demonstrates a denial of that right. *Id.* We have found a *per se* Sixth Amendment violation where trial counsel was implicated in the very crime for which his client was on trial. *See United States v. Cancilla*, 725 F.2d 867 (2d Cir. 1984). We also applied a *per se* rule where a defendant was represented by a person not authorized to practice law. *See Solina v. United States*, 709 F.2d 160 (2d Cir. 1983). In both cases, we found that counsel had reason to fear that vigorous advocacy on behalf of his client might provoke inquiries on the part of the court or prosecutor that might expose the lawyer to criminal liability or other sanction. *See Cancilla*, 725 F.2d at 870; *Solina*, 709 F.2d at 164. However, this Court's decision in *Aiello*, makes clear that Napoli's allegations fail to support a *per se* claim. In *Aiello*, we rejected the argument that an attorney under investigation for obstruction of justice and tax evasion at the time of the defendant's trial on narcotics charges had suffered from an actual conflict of interest constituting a *per se* violation of the defendant's Sixth Amendment right. The four factors on which this Court relied in rejecting Aiello's conflict of interest claim are also present here. First, unlike the facts in *Cancilla*, the attorney's purported activity (*i.e.*, his alleged involvement with the Gotti organization) was totally unrelated to the mail fraud and witness bribery crimes for which Napoli was being tried. *See Aiello*, 900 F.2d at 531. Second, there is no allegation that Shargel's representation of Napoli in the *Eisen* case was the "impetus" for the investigation into Shargel's involvement with the *Gotti* defendants. *See Aiello*, 900 F.2d at 531-32. Third, Napoli has offered no basis upon which to believe that Shargel's defense of Napoli was intended to please or impress the *Gotti* prosecutors, who

did not participate in the *Eisen* case. *See Aiello*, 900 F.2d at 532. Finally, unlike the attorney in *Solina*, there is no question that Shargel was authorized to practice law at all times during this case. *See Aiello*, 900 F.2d at 532.

There is no suggestion that Shargel's vigorous representation of Napoli would have subjected him to sanction or risked exposure of any wrongdoing on his part. And any claim that Shargel's attention may have been "diverted" by the disqualification proceeding in the *Gotti* case is insufficient to establish an actual conflict of interest. A theoretical or merely speculative conflict of interest will not invoke the *per se* rule. *See Aiello*, 900 F.2d at 532.

Because Napoli has failed to show an actual conflict of interest, he must overcome the presumption that his counsel's conduct was reasonable by satisfying the two-pronged standard of *Strickland v. Washington*, 466 U.S. 668 (1984). *See United States v. Cruz*, 785 F.2d 399, 405 (2d Cir. 1986). Napoli must show that (1) "counsel's representation fell below an objective standard of reasonableness" under "prevailing professional norms" and (2) "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 688, 694.

Out of a trial record of almost 10,000 pages, Napoli culls five instances of alleged deficiencies in Shargel's performance. On review of the record, we are convinced that Shargel's overall performance was vigorous, sustained, and effective. Furthermore, we find that none of the five instances complained of falls "outside the wide range of professionally competent assistance." *Id.* at 690.

Napoli first points to Shargel's stipulation that a disputed mailing in the *Robbins* case had been mailed.

Shargel decided to stipulate to the fact of mailing once informed that James LaRossa, co-defendant Eisen's attorney, had entered into a stipulation with the Government to that effect. Napoli now claims that the author of the letter would have testified that the letter had been hand-delivered and that it was incompetent for Shargel to stipulate to the contrary. Napoli ignores evidence that the relevant document had in fact been mailed—a subsequent letter written by its author so stating. Moreover, even if Shargel did not personally verify this fact, it was reasonable for him to rely on the representation of co-defendant's counsel that the author admitted the mailing. Furthermore, had the author been called to take the stand to testify to hand delivery, his testimony would have been impeached by his previous letter maintaining that it had been mailed. *See Aiello*, 900 F.2d at 532-33 (failure to call exculpatory witness not ineffective representation because testimony could have been impeached).

The next four instances of claimed ineffective assistance relate to decisions that "fall squarely within the ambit of trial strategy, and, if reasonably made," cannot support an ineffective assistance claim. *See United States v. Nersesian*, 824 F.2d 1294, 1321 (2d Cir.), *cert. denied*, 484 U.S. 957 (1987). As his second example, Napoli claims that Shargel should have advised him to testify on his own behalf, and that Shargel should have done a more thorough job of impeaching two prosecution witnesses. "The decision whether to call any witnesses on behalf of the defendant, and if so which witnesses to call, is a tactical decision of the sort engaged in by defense attorneys in almost every trial." *Id.* It was a reasonable tactical decision to rely exclusively on attacking the Government's witnesses and presenting independent testimony rather than to subject Napoli to all of the risk attendant on

cross-examination. "Decisions whether to engage in cross-examination, and if so to what extent and in what manner, are similarly strategic in nature." *Id.* Shargel had subjected both of these witnesses to vigorous cross-examination. As Judge Sifton found, Shargel could have reasonably concluded that further cross-examination on relatively unimportant matters would have confused or fatigued the jury.

As the third instance, Napoli points to Shargel's decision not to lay blame for the charged crimes on the other defendants. Clearly this was a reasonable strategic decision. An effort to blame the other defendants might have provoked retaliation in the same vein, and the Government would have been the sole beneficiary of such a development.

Fourth, Napoli claims that, in support of Napoli's motion for sequestration of the jury, Shargel should have introduced newspaper clippings referring to the Government's accusations against Shargel in the *Gotti* case. While this might have been the preferable course, we cannot say that Shargel's omission was below an objective level of competence since none of the other defense attorneys included such clippings in their similar motions but instead relied on paraphrasing. Furthermore, Shargel did submit a number of the press accounts in support of Napoli's claim of error in failure to sequester made in his motion for a new trial. The issue, including the nature and content of the articles, was thus properly preserved for appeal, and no prejudice occurred from the initial failure to include the materials.

Finally, Napoli claims that Shargel's failure to attack the Government in his summation is evidence of a change in his attitude toward the Government following the dis-

qualification motion. Shargel's summation lasted an entire day and occupies almost two hundred pages of transcript. Shargel assailed the Government's evidence in each of the racketeering acts charged against Napoli and reviewed the exculpatory testimony. Furthermore, he clearly was not seeking to curry favor with the prosecution when he claimed that the Government "paid their witnesses with a price that we could never afford," had intentionally overlooked its own witnesses' inconsistent statements, and had been overly "righteous and sanctimonious" in discrediting exculpatory testimony. The comprehensive and vehement nature of Shargel's summation refutes Napoli's claim. *See Nersesian*, 824 F.2d at 1321.

In none of the five instances complained of did Shargel's performance fall below an objective standard of reasonableness, and Napoli does not even attempt to demonstrate a reasonable probability that the result of the proceeding would have been different absent the allegedly unprofessional conduct.

VII. Prosecutorial Misconduct and Prejudicial Publicity Regarding the *Gotti* Case

On Friday, February 22, 1991, after the jury in the *Eisen* trial had begun deliberations, argument was heard on an application by the prosecution in the *Gotti* case to disqualify several of the defense lawyers in that case including Shargel, who was then representing Napoli in the *Eisen* trial. Napoli contends that the prosecutors in the *Gotti* case acted improperly by repeating in open court allegations made against Shargel in the Government's sealed papers, and that these allegations improperly affected the jury's deliberations in the *Eisen* case. Napoli also argues that the Court improperly denied his motion to sequester the jury.

"If a prosecutor abuses her discretion by intentionally attempting to distort the fact-finding process, then a due process violation exists." *United States v. Angiulo*, 897 F.2d 1169, 1191 (1st Cir.), *cert. denied*, 111 S. Ct. 130 (1990). But Napoli does not claim that the Government prosecutors in the *Gotti* case intentionally provoked press coverage with the aim of prejudicing the jury in the *Eisen* case, nor does he offer any evidence that the *Gotti* prosecutors even anticipated such a result. Moreover, the District Court took suitable precautions to ensure that the jury was not exposed to the press accounts of the allegations.

When the problem was brought to Judge Sifton's attention on the Friday of the hearing in the *Gotti* case, the Judge determined that he would speak with each juror individually in chambers about avoiding all news media over the weekend. Defense counsel objected to individual interviews, arguing that it would magnify the problem, and instead requested sequestration. The Judge denied sequestration, but conducted a general inquiry of the jury, asking the jury to avoid all news media over the weekend and providing a means by which concerned jurors could call the Court to ascertain the progress of then pending events in the Persian Gulf without resort to the media. The jurors gave their general agreement that they could comply.

The steps taken to protect the integrity of the jury deliberations were adequate under the circumstances. In *United States v. Casamento*, 887 F.2d 1141, 1154-55 (2d Cir. 1989), *cert. denied*, 493 U.S. 1081 (1990), this Court found that the "great deal" of media attention surrounding an organized crime trial did not render it unfair in light of Judge Leval's instruction to the jury to avoid press accounts about the case. We held that "[i]n the absence of

evidence to the contrary, we will presume the jury followed these admonitions and avoided exposure to news reports about the trial." *Id.* Although Judge Leval conducted an individual interview with the jurors, the defendants here specifically requested that no such individual *voir dire* be conducted for fear of magnifying the problem. *See also United States v. Gaggi*, 811 F.2d 47, 53 (2d Cir.), *cert. denied*, 482 U.S. 929 (1987).

Moreover, as in *Gaggi*, we may find confirmation of the jury's ability to render an impartial verdict in "the care which it took in its deliberations." 811 F.2d at 53. As the District Court noted in rejecting these claims post-trial, jury deliberations lasted from February 14 through March 4, 1991, with several notes sent out each day requesting to review exhibits or to have extensive testimony read back. And in its determination, the jury carefully distinguished among defendants and among predicate acts, finding 16 of 22 racketeering acts proven.

In the absence of any suggestion that the prosecutors in the *Gotti* case were acting in bad faith, in light of the fact that the allegations did not concern the trial in this case, the defendants on trial, or any of the events at issue in the case, and giving due weight to the district court's cautionary measures, we find no due process violation and reject Napoli's request for a new trial.

Furthermore, Napoli's claim that the District Court erred in denying his motion to sequester the jury in response to the *Gotti* proceedings is without merit. "The decision to sequester the jury to avoid exposure to publicity is committed to the discretion of the court, and failure to sequester the jury can rarely be grounds for reversal." *United States v. Salerno*, 868 F.2d 524, 540 (2d Cir.), *cert. denied*, 491 U.S. 907 (1989). Judge Sifton did

not abuse his discretion and his precautions seem entirely adequate to the remote threat of prejudice from the expected publicity concerning Napoli's attorney and his representation of another client in a completely unrelated matter.

VIII. Sentencing

Fishman, Napoli, Gabe, and Rella contend that the District Court erred in applying the Sentencing Guidelines in sentencing them on the RICO conspiracy count. Each of these defendants asserts that, for various reasons, his liability for participation in the conspiracy cannot extend past November 1, 1987, the effective date of the Guidelines. We conclude that the District Court correctly applied the Sentencing Guidelines to each of these defendants.

This Court has determined that persons convicted of offenses that began before and continued after November 1, 1987, (so called "straddle crimes") would, upon sentencing, be subject to the Sentencing Guidelines. *See United States v. Story*, 891 F.2d 988, 994 (2d Cir. 1989). The RICO conspiracy charged in this case ran from January 1981 to June 1990, and thus straddled the effective date of the guidelines. Moreover, the jury found three defendants—Eisen, Gabe, and Morganti—guilty of a predicate act of mail fraud in connection with the *Stanton* case, which included a mailing on March 29, 1988. Thus, the conspiracy of which the defendants were convicted continued after the effective date of the guidelines.

Gabe complains that the jury was not asked to determine whether the conspiracy straddled the effective date of the Guidelines. However, for purposes of applying the Guidelines, "the period during which an offense occurs is

considered a 'sentencing factor' to be determined by a judge—instead of an element of the offense to be determined by a jury." *United States v. Bloom*, 945 F.2d 14, 17 (2d Cir. 1991). The District Court did not err in finding by a preponderance of the evidence that the conspiracy extended beyond November 1, 1987. Gabe also argues that he should not have been sentenced under the Guidelines because he played a "minimal role" in the conspiracy. The extent of Gabe's role, while relevant in determining the appropriate length of his sentence within the Guidelines, *see* U.S.S.G. § 3B1.2 (Guideline adjustments for mitigating role in the offense), has no bearing on the threshold question of whether the Guidelines should apply to his conspiracy conviction.

Napoli argues that application of the Guidelines to his conviction violates *ex post facto* principles because he "did nothing after November 1, 1987 and did not plan anything which ultimately transpired after that date." Brief for Appellant Napoli at 140. The Court may find a continuation of conspiratorial liability even though the particular defendant has ceased to engage in overt conduct relating to the conspiracy prior to November 1, 1987, if it was foreseeable that the conspiracy would continue past that date. *See, e.g., United States v. Devine*, 934 F.2d 1325, 1332 (5th Cir.), *cert. denied*, 112 S. Ct. 349 (1991). This holding derives from the basic principle that conspirators are generally held liable for the known or reasonably foreseeable acts of all other co-conspirators committed in furtherance of the conspiracy. *See Pinkerton v. United States*, 328 U.S. 640, 647 (1946). Contrary to Napoli's contention, the acts of co-conspirators occurring after November 1, 1987, may be attributable to a defendant for purposes of the application of the Sentencing Guidelines in the absence of evidence that the

defendant somehow "caused" those acts. *See United States v. Rosa*, 891 F.2d 1063, 1068-69 (3d Cir. 1989) (applying Guidelines to co-conspirator who did nothing to further the conspiracy after 1986 in the absence of any proof that he affirmatively renounced the conspiracy prior to November 1, 1987). Defendants committing no acts in furtherance of a conspiracy after the effective date of the Guidelines are not subject to *ex post facto* punishment because they could have "taken steps to prevent the final element of the crime from occurring," *United States v. Alkins*, 925 F.2d 541, 549 (2d Cir. 1991), before the statute became effective; they could have withdrawn from the conspiracy. *See Rosa*, 891 F.2d at 1069. Napoli does not claim that he ever withdrew from the conspiracy.

Rella and Fishman contend that they affirmatively withdrew from the conspiracy before the effective date of the Guidelines. In order to demonstrate withdrawal from a conspiracy, the defendant has the burden of proving "some act that affirmatively established that he disavowed his criminal association with the conspiracy . . . and that he communicated his withdrawal to the co-conspirators." *United States v. Minicone*, 960 F.2d at 1108 (2d Cir. 1992) (citations omitted). "[M]ere cessation of conspiratorial activity is not enough" to satisfy this standard. *United States v. Nerlinger*, 862 F.2d 967, 974 (2d Cir. 1988).

Rella contends that he withdrew from the conspiracy when he left the firm as its "in-house" investigator in 1984. However, Rella continued to work for the firm on an *ad hoc* basis thereafter. The parties' stipulation that there was no showing that any of the work performed by Rella after 1984 was tainted by illegality does not alter the significance of Rella's continued association with the Eisen firm. The District Court correctly found that the

stipulation established, at most, Rella's "mere cessation" of illegal conduct, which was insufficient to prove his withdrawal from the conspiracy. *Id.* at 974.

Fishman contends that he affirmatively withdrew from the conspiracy before the effective date of the Guidelines by resigning his position at the Eisen firm in order to practice with another, independent law firm. Fishman relies on this Court's decision in *Nerlinger*, in which the defendant participated in a conspiracy to defraud the customers of a brokerage firm. The defendant's role in the conspiracy was to open and maintain a bogus account with the firm for the purpose of diverting profits fraudulently obtained by his co-conspirators. *Id.* We ruled that the defendant had withdrawn from the conspiracy before the conspiracy's termination by resigning from the brokerage firm and closing the account, reasoning that by doing so the defendant had foreclosed the possibility of further participation in the conspiracy and relinquished any claim to subsequent profits. *Id.* at 974-75. However, in this case the District Court found that there was evidence that, after leaving the law firm, Fishman "continued to be entitled to a percentage of the recovery on all cases he tried including those giving rise to his pre-1985 racketeering acts."

Fishman argues that he received an annualized salary from the Eisen firm and was not entitled to a percentage of the recovery of the cases he tried. Stephen DiJoseph, a cooperating co-defendant, testified that Fishman had told him that he was getting "a piece of the action on the cases he tried." Fishman faults the District Court for denying his request for a hearing on this disputed sentencing factor. However, the District Court has broad discretion to determine the procedure by which it will resolve disputed issues at sentencing, so long as it affords the defendant

some opportunity to rebut the Government's allegations. *See United States v. Prescott*, 920 F.2d 139, 143-44 (2d Cir. 1990). The District Court did not abuse its discretion in denying the hearing and was not clearly erroneous in concluding that Fishman failed to satisfy his burden of proving withdrawal from the conspiracy.[8]

Conclusion

We have considered appellants' other arguments and find them to be without merit. The judgments of conviction appealed from are all affirmed.

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8 The District Court also relied on another episode in determining that Fishman had not withdrawn from the conspiracy. The District Court found that in February 1988, Fishman, together with defendant Weinstein, sought to convince DiJoseph to lie to investigators in order to conceal his role in the *Schwartz* fraud. Fishman argues that such an effort constituted a later agreement between himself and Weinstein to conceal an earlier conspiracy and not a continuation in, or rejoining of, the original conspiracy. Post-conspiracy acts of concealment do not, without more, extend the life of the conspiracy after its main objective has been attained. *See Grunewald v. United States*, 353 U.S. 391, 399-402 (1957); *Krulewitch v. United States*, 336 U.S. 440, 442-44 (1949). Fishman, however, does not dispute that the original conspiracy was ongoing in February 1988, when he made the statements in question. Because the District Court found that Fishman did not effectively withdraw from the conspiracy when he resigned from the Eisen firm, Fishman was still a member of the conspiracy at the time of these efforts, and, clearly, acts or statements designed to conceal an ongoing conspiracy are in furtherance of that conspiracy. *See United States v. Beech-Nut Nutrition Corp.*, 871 F.2d 1181, 1199 (2d Cir.), *cert. denied*, 493 U.S. 933 (1989).

ORDER DENYING PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 20th day of October one thousand nine hundred and ninety-two.

UNITED STATES of AMERICA,
Appellee,
v.
LEONARD KAGEL,
Defendant,

MORRIS J. EISEN; JOSEPH P. NAPOLI; HAROLD M. FISHMAN; DENNIS RELLA; MARTY GABE; GERALDINE G. MORGANTI; ALAN WEINSTEIN
Defendants-Appellants.

DOCKET NUMBER: 91-1549(l), 91-1551, 91-1553, 91-1554, 91-1555, 91-1633, 92-1032,

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A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsels for Defendant-Appellants Morris J. Eisen, Joseph P. Napoli, Marty Gabe, Dennis Rella, and Geraldine G. Morganti,

Upon consideration by the panel that decided the appeal, it is

Ordered that said petitions for rehearing are DENIED.

It is further noted that the suggestions for rehearing in banc have been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

s/Elaine B. Goldsmith,
ELAINE B. GOLDSMITH,
Clerk

s/by Carolyn Clark Campbell
Chief Deputy Clerk

Supreme Court, U.S.
FILED
JAN 27 1993
OFFICE OF THE CLERK

Nos. 92-919, 92-968 and 92-969

In the Supreme Court of the United States

OCTOBER TERM, 1992

MORRIS J. EISEN, PETITIONER

v.

UNITED STATES OF AMERICA

GERALDINE G. MORGANTI AND DENNIS RELLA, PETITIONERS

v.

UNITED STATES OF AMERICA

JOSEPH P. NAPOLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the government adequately established the state-law predicate offenses on which petitioners' racketeering convictions were based.

2. Whether the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*, is unconstitutionally vague.

3. Whether mail fraud in violation of 18 U.S.C. 1341 (1988 & Supp. III 1991) constitutes a RICO predicate offense when the fraudulent scheme involves a violation of a state perjury statute that does not itself constitute a predicate offense.

4. Whether a defendant can "conduct or participate, directly or indirectly, in the conduct of [the] enterprise's affairs through a pattern of racketeering activity" in violation of 18 U.S.C. 1962(c) without exercising control over the management or operation of the enterprise.

5. Whether the district court erred in responding to petitioners' claim that the jury would be influenced by media reports about actions one of petitioners' lawyers took in another case.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-919

MORRIS J. EISEN, PETITIONER

v.

UNITED STATES OF AMERICA

No. 92-968

GERALDINE G. MORGANTI AND DENNIS RELLA, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 92-969

JOSEPH P. NAPOLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-45a)[1] is reported at 974 F.2d 246.

JURISDICTION

The judgment of the court of appeals was entered on August 17, 1992. A petition for rehearing was denied on October 20, 1992. Pet. App. 46a. The petitions for a writ of certiorari were filed on November 27, 1992 (in No. 92-919) and December 7, 1992 (in Nos. 92-968 and 92-969). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a four-month jury trial in the United States District Court for the Eastern District of New York, petitioners Eisen, Morganti, and Napoli were convicted of racketeering and conspiracy to engage in racketeering, in violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1962(c) and (d) (RICO); petitioner Rella was convicted of conspiracy to commit racketeering offenses. Petitioner Eisen was sentenced to 57 months' imprisonment, fined $100,000, and ordered to forfeit $500,000 and to make restitution of $17,100. Petitioner Morganti was sentenced to 37 months' imprisonment, fined $25,000, and ordered to make restitution of $17,100. Petitioner

[1] "Pet. App." refers to the appendix to the petition in No. 92-919.

Napoli was sentenced to 46 months' imprisonment, fined $75,000, and ordered to forfeit $30,000. Petitioner Rella was sentenced to 24 months' imprisonment. Gov't C.A. Br. 2. The court of appeals affirmed. Pet. App. 1a-45a.

1. Morris J. Eisen, P.C., was a Manhattan law firm that specialized in bringing personal injury suits on behalf of plaintiffs. The Eisen firm earned millions of dollars in contingency fees by bringing false personal injury suits, paying friendly witnesses to testify favorably and hostile witnesses not to testify at all, and creating false photographs, documents, and physical evidence of accidents for use before and during trial. Petitioner Eisen was the founder, sole shareholder, and principal attorney of the Eisen firm. Petitioner Napoli was associated with the firm in an "of counsel" capacity and was the firm's main trial attorney. Petitioner Morganti was the office administrator of the Eisen firm. Petitioner Rella was a private investigator affiliated with the firm. Pet. App. 3a-4a; see Gov't C.A. Br. 5-29.

2. A grand jury indicted petitioners for racketeering and conspiracy to engage in racketeering, in violation of 18 U.S.C. 1962(c) and (d). To establish the requisite "pattern of racketeering activity," the indictment alleged that petitioners had bribed witnesses, in violation of N.Y. Penal Law §§ 20.00 (1987) and 215.00 (McKinney 1975), and committed mail fraud, in violation of 18 U.S.C. 1341 (1988 & Supp. III 1991). Indictment 1-37. At trial, the government offered testimony of some of petitioners' former accomplices to establish the predicate racketeering acts. Petitioners submitted a proposed jury in-

struction articulating a New York rule that requires the prosecution to corroborate accomplice testimony used to prove serious offenses.[2] The court refused to give the proposed instruction. See 92-919 Pet. 10-12.

At the time of petitioners' trial, the government was engaged in the unrelated RICO prosecution of John Gotti, which also was pending in the United States District Court for the Eastern District of New York. While petitioners' jury was deliberating, the court in the Gotti prosecution heard argument on the government's motion to disqualify several of the defense attorneys in that case, including Gerald L. Shargel, who was at the same time representing petitioner Napoli in this case. When the government's disqualification motion became the subject of substantial media coverage, petitioner Napoli argued that the media coverage of his attorney in the Gotti prosecution would lead the jury in this case to associate him with the defendants in the Gotti prosecution. The district judge decided that the proper course was to advise each juror individually in chambers to avoid all news media reports over the coming weekend. Napoli's counsel objected to individual interviews and requested that the jury instead be sequestered. The judge denied the request but admonished the jury to avoid all news media reports over the weekend. The court set up a telephone line the jurors could call to receive news about events in the Persian Gulf. Pet. App. 38a-39a; see Gov't C.A. Br. 184-185.

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[2] See *United States* v. *Paone*, 782 F.2d 386, 393-394 (2d Cir.) (discussing the rule), certs. denied, 479 U.S. 882 (1986) and 483 U.S. 1019 (1987); 92-919 Pet. 11 n.2 (same).

After the jury convicted petitioners on the racketeering and racketeering conspiracy counts, the district court vacated petitioner Rella's substantive racketeering conviction because the racketeering acts underlying that conviction were not committed within the limitations period. Pet. App. 5a & n.1; Gov't C.A. Br. 2 & n.1.

3. The court of appeals affirmed. Pet. App. 1a-45a. The court specifically rejected eight of petitioners' claims, two of which are presented in these petitions. First, it concluded that mail fraud may serve as a RICO predicate offense even when the fraudulent scheme effectuated by the mailing involves a state-law perjury offense that would not itself constitute a predicate offense under RICO. *Id.* at 10a-11a. The court explained that "where, as here, a fraudulent scheme falls within the scope of the federal mail fraud statute and the other elements of RICO are established, use of the mail fraud offense as a RICO predicate act cannot be suspended simply because perjury is part of the means for perpetrating the fraud." *Id.* at 10a. Second, the court rejected petitioner Napoli's claim that the trial court erred in refusing to sequester the jury to protect it from publicity concerning his counsel's actions in the Gotti prosecution. *Id.* at 38a-41a. The court noted that the trial court admonished the jurors to avoid media reports of all kinds until the end of the trial. The court also noted that the allegations regarding counsel's conduct in the Gotti case did not concern the trial in this case. *Id.* at 40a. Finally, the court disposed of a number of petitioners' other claims by "find[ing] them to be without merit." *Id.* at 45a.

ARGUMENT

1. Petitioners' principal claim is that the bribery offenses that were used as predicate acts in their prosecutions were not "chargeable under State law" for purposes of 18 U.S.C. 1961(1)(A) (1988 & Supp. III 1991), and that the racketeering convictions resting on those offenses thus should be overturned. 92-919 Pet. 14-45; 92-968 Pet. 13-19; 92-969 Pet. 28-34. RICO proscribes participation in the conduct of an enterprise's affairs "through a pattern of racketeering activity." 18 U.S.C. 1962(c). Section 1961(1)(A), in turn, defines "racketeering activity" to include a variety of offenses "chargeable under State law." In this case, the government relied on state-law bribery offenses as some of the predicate acts of racketeering activity. The indictment cited N.Y. Penal Law §§ 20.00 (1987) and 215.00 (McKinney 1975), see, *e.g.*, Indictment 10, 18, and the district court properly instructed the jury that it could convict petitioners only if it found that the government had proved all of the elements of the offenses created by those provisions of New York law. Tr. 9114-9116.[3]

[3] Because the government in this case proved all of the substantive elements of the state-law crimes it used as predicate offenses, petitioner Eisen accomplishes nothing by his extensive discussion (92-919 Pet. 14-45), joined by the other petitioners (see 92-968 Pet. 13-14; 92-969 Pet. 28-29), of the uncertainty in the lower courts regarding the circumstances in which the government must establish all the state-law elements to establish predicate offenses in prosecutions under RICO and the Travel Act, 18 U.S.C. 1952 (1988 & Supp. III 1991). Whether or not the government always must establish the precise elements of a particular state-law crime to use it as a predicate for a RICO offense, the convictions in this case were proper

Petitioners correctly point out that the district court declined to instruct the jury that the government was required to corroborate accomplice testimony that the government used to establish the predicate offenses in question. See 92-919 Pet. 10-11 & n.2; 92-968 Pet. 14-19. But the text of RICO plainly does not require such proof. Whether or not the government corroborated the testimony of the accomplices, the charged conduct that the government established at trial was "chargeable under State law," which is all that RICO requires. As the Second Circuit explained in *United States* v. *Paone*, 782 F.2d 386, cert. denied, 479 U.S. 882 (1986), the language of the statute makes it clear that "Congress did not intend to incorporate the various states' procedural and evidentiary rules into the RICO statute." 782 F.2d at 393.[4]

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because the government specifically established all the elements of the state-law bribery offenses at issue here. Petitioner Napoli's argument (92-969 Pet. 29-34) that the trial court did not properly instruct the jury regarding the "understanding" element of the state-law offenses was not raised in the court of appeals and is thus not properly before this Court. See Napoli C.A. Br. 49-60. Compare, *e.g.*, *Demarest* v. *Manspeaker*, 111 S. Ct. 599, 603 (1991). In any event, Napoli's argument on that state-law question does not appear to raise a substantial question of federal law.

[4] See *United States* v. *Coonan*, 938 F.2d 1553, 1564 (2d Cir. 1991), cert. denied, 112 S. Ct. 1486 (1992); *United States* v. *Erwin*, 793 F.2d 656, 669 (5th Cir.), cert. denied, 479 U.S. 991 (1986); *United States* v. *Licavoli*, 725 F.2d 1040, 1047 (6th Cir.) ("The reference to state law in [RICO] is simply to define the wrongful conduct, and is not meant to incorporate state procedural law."), cert. denied, 467 U.S. 1252 (1984); *United*

Petitioners do not suggest that any other court would have required the prosecution to adhere to state-law procedural requirements like the corroboration requirement at issue in this case. In light of the clear intent of the RICO statute on the point, petitioners' claim does not merit review by this Court.

2. Petitioners also contend (92-919 Pet. 46-64; 92-968 Pet. 20; 92-969 Pet. 39) that RICO is unconstitutionally vague. That claim does not merit review.

Absent First Amendment considerations, a defendant may not challenge a statute for vagueness on the ground that there is some uncertainty regarding the full reach of the statute in marginal cases not before the court. Rather, the defendant must show that the statute is vague as applied to the particular conduct with which he is charged. See *Village of Hoffman Estates* v. *The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-495 & n.7 (1982); *United States* v. *Powell*, 423 U.S. 87, 92 (1975). Thus, to sustain such a vagueness attack, the defendant must show that the statute fails to give a person of ordinary intelligence reasonable notice that his conduct is forbidden. See *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983); *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972).

Whatever ambiguity may exist at the margins of the RICO statute, it is clear that the statute is sufficiently precise to pass constitutional muster as applied in this case. First, contrary to the argument advanced by petitioner Eisen (92-919 Pet. 46-57), any

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States v. *Muskovsky*, 863 F.2d 1319, 1331 (7th Cir. 1988), cert. denied, 489 U.S. 1067 (1989).

person of ordinary intelligence would understand that the phrase "chargeable under State law" in 18 U.S.C. 1961(1)(A) (1988 & Supp. III 1991) includes the bribery offenses used as predicate offenses in this case. The jury was instructed that it could convict petitioners only if it found that they had violated all of the elements of a specific New York bribery statute. Assuming that the jury correctly found those facts to be true, it is plain that the conduct would have been "chargeable under State law." The fact that the government proved those violations in a federal court using federal procedural and evidentiary rules does not obscure the fact that the substantive conduct is forbidden by the New York statute and chargeable as a criminal offense under that statute.

The same is true of petitioner Eisen's challenge (92-919 Pet. 57-64) to RICO's "pattern" requirement, in which the other petitioners join (92-968 Pet. 20; 92-969 Pet. 39). That challenge relies primarily on the concurring opinion in *H.J. Inc.* v. *Northwestern Bell Telephone Co.*, 492 U.S. 229, 254-256 (1989), in which Justice Scalia, joined by three other Justices, expressed doubt whether the RICO "pattern" element could withstand a constitutional vagueness challenge.[5] But even in the wake of *H.J. Inc.*, the courts of appeals uniformly have rejected vagueness challenges to RICO's "pattern" requirement. See *United States* v. *Coiro*, 922 F.2d 1008, 1016-1017 (2d Cir.), cert. denied, 111 S. Ct. 2826 (1991); *United States* v. *Woods*, 915 F.2d 854, 862-864 (3d Cir. 1990), cert. denied, 111 S.

[5] The RICO statute states that a "pattern" requires "at least two acts of racketeering activity" within a particular ten-year period. 18 U.S.C. 1961(5).

Ct. 1413 (1991); *United States* v. *Pungitore*, 910 F.2d 1084, 1102-1105 (3d Cir. 1990), cert. denied, 111 S. Ct. 2009 (1991); *United States* v. *Angiulo*, 897 F.2d 1169, 1178-1180 (1st Cir.), cert. denied, 111 S. Ct. 130 (1990). In any event, the lengthy series of similar racketeering acts committed by the law firm under petitioners' direction[6] would satisfy any plausible definition of the "pattern" requirement. Petitioners' vagueness challenge to the "pattern" requirement thus has no merit.

3. Petitioners Morganti, Rella, and Napoli also argue (92-968 Pet. 21; 92-969 Pet. 35-38) that mail fraud does not constitute a valid predicate offense under RICO if the fraudulent scheme involves state-law perjury, because such a perjury offense would not itself constitute a RICO predicate offense.[7] That claim is meritless. Section 1961(1)(B) of Title 18 (1988 & Supp. III 1991) describes the conduct that constitutes "racketeering activity" for purposes of RICO; the definition includes "any act which is indictable under * * * section 1341 (relating to mail fraud)." Petitioners do not argue that the conduct in question was not indictable as a violation of 18 U.S.C.

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[6] For a summary of 16 of the racketeering acts, see Gov't C.A. Br. 7-29.

[7] Despite Napoli's arguments to the contrary (92-969 Pet. 36-37), it is irrelevant that one of the predicate acts of mail fraud was established with the aid of a stipulation. Napoli's counsel agreed to the stipulation and moved to withdraw it only after the jury had begun deliberating and had asked to review the evidence showing that the letter was mailed. Gov't C.A. Br. 156. The accuracy of the stipulation is not relevant to the question whether mail fraud is a valid RICO predicate offense when it is related to perjury.

1341 (1988 & Supp. III 1991); the plain language of the statute therefore rebuts their argument.[8] The fact that the purpose of the fraudulent scheme in question was to commit an act that would not itself have been a federal offense is irrelevant, just as it would have been irrelevant in a prosecution for the mail fraud itself. The justification for federal criminal sanctions in a RICO case of this sort, as in Section 1341, is Congress's judgment that fraudulent conduct involving the use of the mails interferes with distinctly federal interests not adequately addressed by state criminal sanctions. Moreover, petitioner Napoli acknowledges that apart from the Second Circuit's opinion in this case, "there is no authority concerning the use of mail fraud as a predicate act" in this context. 92-969 Pet. 37. Accordingly, petitioner's challenge to the mail fraud predicate offenses does not merit plenary review.

4. Napoli also claims (92-969 Pet. 15-20) that his RICO convictions are improper because he was merely of counsel to the Eisen firm, and "did not participate in the conduct of [the] enterprise's affairs within the meaning of [the] RICO statute," *id.* at 19. In particular, he contends that the phrase in 18 U.S.C. 1962(c) requiring the defendant "to conduct or participate, directly or indirectly, in the conduct of [the] enterprise's affairs through a pattern of

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[8] As the court of appeals explained, "where, as here, a fraudulent scheme falls within the scope of the federal mail fraud statute and the other elements of RICO are established, use of the mail fraud offense as a RICO predicate act cannot be suspended simply because perjury is part of the means for perpetrating the fraud." Pet. App. 10a.

racketeering activity" can be satisfied only by proof that the defendant exercised control over the management or operation of the enterprise. Although the Court granted certiorari to consider that question in *Reves* v. *Ernst & Young*, 112 S. Ct. 1159 (1992) (No. 91-886), the petition need not be held pending disposition of that case, because Napoli did not raise the issue in the court of appeals. Accordingly, the claim is not properly before the Court, and petitioner Napoli would not be entitled to relief under any disposition of *Reves*. See, *e.g.*, *Demarest* v. *Manspeaker*, 111 S. Ct. 599, 603 (1991).

5. Finally, petitioner Napoli claims (92-969 Pet. 21-27) that the trial court erred in its treatment of his claims relating to the publicity surrounding his counsel's behavior in the Gotti prosecution. After reviewing the record, the court of appeals summarized the relevant events as follows:

> When the problem was brought to Judge Sifton's attention on the Friday of the hearing in the *Gotti* case, the Judge determined that he would speak with each juror individually in chambers about avoiding all news media over the weekend. Defense counsel objected to individual interviews, arguing that it would magnify the problem, and instead requested sequestration. The Judge denied sequestration, but conducted a general inquiry of the jury, asking the jury to avoid all news media over the weekend and providing a means by which concerned jurors could call the Court to ascertain the progress of then pending events in the Persian Gulf without resort to the

> media. The jurors gave their general agreement that they could comply.

Pet. App. 39a. As that discussion makes clear, "[t]he steps taken to protect the integrity of the jury deliberations were adequate under the circumstances." *Ibid.* Although it might have been appropriate for the district court to have sequestered the jury, petitioner has identified no reason to believe that the trial court was required to proceed as petitioner suggested. The district court's exercise of its discretion in determining how to proceed in these particular circumstances does not present a legal question of general significance.[9]

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[9] To the extent petitioner claims that the trial court erred by declining to hold a hearing to evaluate his factual assertion that the jury disobeyed its instructions and was affected by the media coverage (92-969 Pet. 25-26), the claim is not properly before the Court, because Napoli did not raise that claim in the court of appeals. In that court he argued not that the trial court erred in declining to investigate his assertions of juror misconduct, but that he was entitled to a new trial based on his view that the trial judge should have sequestered the jury. See Napoli C.A. Br. 84-97. In any event, the question whether petitioner's allegations that the jurors disobeyed their instructions were of sufficient weight to require the trial judge to conduct a hearing is not one of general significance, but involves the application of well-settled principles of law to the facts of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Supreme Court, U.S.
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No. 92-969

IN THE

Supreme Court of the United States

October Term, 1992

JOSEPH P. NAPOLI,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S REPLY BRIEF

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SUPREME COURT OF THE UNITED STATES

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JOSEPH P. NAPOLI,

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Respondent.

PETITIONER JOSEPH NAPOLI'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT FOR THE APPEALS FOR THE SECOND CIRCUIT

Petitioner Joseph P. Napoli, pro se, respectfully submits this Reply to correct certain factual assertions made by the government in its brief in opposition.

In its opposing brief, at pp 11-12, par 4, of the Argument, the government

incorrectly stated that Petitioner did not argue in the Court of Appeals that, because he was merely "of counsel" to the firm, he "'did not participate in the conduct of [the] enterprise's affairs within the meaning of [the] RICO statute'", citing Reves v Ernst & Young, 112 S.Ct. 1159 (1992) (No. 91-886).

This argument was expressly raised in Petitioner Napoli's Brief submitted in Reply to the government's answering brief, at Point VI, pp 27-30, and was raised again in connection with his Petition for Rehearing, with a suggestion for Rehearing En Banc, at Point I, pp 8-11. In each instance, the Reves case was cited. No application was made by the government to strike the Point from Petitioner's Brief and, in its decision affirming the convictions, the Second Circuit, without commenting on that and other issues, said "[w]e have considered appellants' other

arguments and find them to be without merit" (Pet. App. 45a).

The question presented in Petitioner Napoli's Petition, subd 1, pp 15-20, was "'pressed [and] passed upon below'" and is therefore reviewable by this Court (United States v Williams, __ U.S. __, 112 S.Ct. 1735, 1738-41).

Similarly unavailing are the government's contentions at pp 8 N.3, and at p 13 N.9, that petitioner did not present his claims to the Court of Appeals that the trial court did not properly instruct the jury regarding the "understanding" element of the state law offense (bribery), and that the trial court erred in declining to conduct a hearing on juror taint, respectively. The contention that the trial court did not properly instruct the jury was raised in Petitioner's Brief, Point III, pp 64-5. With regard to the trial court's failure to

conduct a hearing, that issue too was specifically raised in Petitioner's Brief Point V, p 97 and in Point I, pp 3-5, of his Brief in Reply.

The government's observations at pp 6-7 concerning Petitioners' arguments about the meaning of "chargeable under State Law" (18 U.S.C. § 1961 [1][A]), are simply wrong. The point is that under New York law accomplice corroboration is a component of a legally sufficient case which the State is obligated to establish (see N.Y. Crim.Pro.L. 70.10 and 70.20). Similarly the meaning of "understanding" in the New York statute defining bribery, is subject to New York and not federal law. The trial court did not include in its charge to the jury on state bribery the meaning of "understanding" recently articulated by the New York Court of Appeals in People v Bac Tran, 80 N.Y.2d 170 (1992).

Finally, Petitioner adopts the arguments set forth in the Petition of Alan Weinstein at Point II, pp 18-26, concerning the use of mail fraud as a predicate act in a RICO prosecution to disguise what was essentially state perjury racketeering acts, to supplement the arguments made in Point IV, pp 35-38 of the Petitioner Napoli's brief.[1]

For the foregoing reasons, the Petition should be granted.

Dated: February 2, 1993

Respectfully submitted,

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[1] Petitioner Alan Weinstein was one of the seven defendants in United States v Morris J. Eisen, et al., who was convicted and appealed to the United States Court of Appeals for the Second Circuit. Petitioner Weinstein filed his Petition after Petitioner Napoli filed his.